

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

(Vol. I, J.A. 1-267)

I

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO

Appellants

v.

JULIUS SANKIN

Appellee

No. 21957

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 14 1960

JAMES T. BENN

Appellant

v.

JOSEPH A. GARFIELD, et al.
Appellees

Nathan J. Paulson
CLERK

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN

vs. 5410 Conn. Ave., et al

C. A. No. 1493-59

Preceding Page No. 1

DATE	PROCEEDINGS	FEE	TOTAL
	PARTIES	ATTORNEYS	
	JULIUS SANKIN	Brown & Brown	
		514 Colorado Bldg.	
	v.		
1.	5410 CONNECTICUT AVENUE CORPORATION, a District of Columbia Corporation	Joseph Pardo, c/o Hilland Hyde & Mack Dinty Warrington Whiting/ Hilland, Hyde & Mack Sherman Elder Hilland, Mack & Hogan Nicholas J. Chase 410 Shoreham Bldg. Wyatt Bldg. C. Bastian	
2.	JAMES T. BENN	Munter, Adams, Thompson & Bastian National Press Building	
3.	JOSEPH A. GARFIELD	Douglas, Obeare & Campbell 822 Southern Bldg.	
4.	BENJAMIN H. SAUNDERS, as Secretary of 5410 Connecticut Avenue Corporation and individually.	Arthur J. Hilland Ferdinand J. Mack James E. Hogan 410 Shoreham Bldg.	
5.	GARFIELD & SANKIN, INC., a District of Columbia Corporation	Arthur M. Chaite 1523 L St., N.W.	
6.	JULIUS SANKIN, INC., a District of Columbia Corporation	Arthur M. Chaite 1523 L St., N.W.	
7.	ARTHUR M. CHAITE, as a Director of Garfield & Sankin, Inc., and Julius Sankin, Inc.	H. Nathaniel Blaustein 1412 Wyatt Bldg.	
8.	THE RISKS NATIONAL BANK, a corporation	Hogan and Hartson 810 Colorado Bldg.	
9.	HARRY W. LISK, individually and as a director, shareholder and shareholder of 5410 Connecticut Avenue Corporation	Front-and-Towers John A. Mack 605--Southern-Bldg.	
10.	as officer, director, & shareholder of 5410 Connecticut Ave. Corporation	- do -	

3

Primer

ATTORNEYS

NUMEROUS

1.193-59

(See preceding page)

ACTION FOR

DECLARATORY JUDGMENT, TO SET
ASIDE AND VOID FRAUDULENT
TRANSFERS, ETC.

5410 CONNECTICUT AVENUE CORPORATION
a District of Columbia Corporation
Et Al

TAXED COSTS

Atty.

Marshall

Clerk

Witnesses

Depositions

Examiner

Jury demand ☐

Ct. Appls.

[See preceding page for complete caption)

Report Judgt. ☐**TOTAL**[illegible]

JA 3

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CIVIL DOCKET

United States District Court for the District of Columbia

DATE	PROCEEDINGS	FEE	TOTAL
	Deposit for cost by		
29	Complaint, appearance Exhibits A,B,C,D,E & F filed		
29	Summons, copies (8) and copies (8) of Complaint issued 1,3,5,6,8 ser.5-29; #4 ser. 6-2-59; #7 ser. 6-11-59; #2 N.F. 6-19-59;		
29	Temporary restraining order, hearing on motion for preliminary injunction sat at 10 A.M. June 5, 1959, \$2,500.00 bond. (signed at 3:25 P.M.) (N) Letts, C.J.		
29	Injunction undertaking of pltf. with The Home Indemnity Co. in the amount of two thousand five hundred dollars (\$2,500.00) approved. Letts, C.J.		
29	Motion of pltf. for preliminary injunction; Motion of pltf. for temporary restraining order. 1,3,5,6,8 ser 5-29. #4 ser.6-2; #2 N.F.6-19; #7 ser.6-11 filed.		
5	Answer of deft. #8 to complt.; Counter-claim for interpleader; Exhibits A-E; c/m 6-4-59. Appearance of Hogan and Hartson. filed.		
5	Appearance of Douglas, Obeir, and Campbell for deft. #3. filed.		
5	Appearance of Hilland, Hyde, and Mack for deft. #1. filed.		
5	Appearance of Dinty Warrington Whiting for deft. #1. filed.		
5	Appearance of Joseph Pardo for deft. #1. filed.		
8	Order extending temporary restraining order issued May 29, 1959 to the 18th day of June 1959; to expire of its own terms on or before 10-days. (N) Pine, J.		
8	Findings of Fact and Conclusions of Law. (N) Pine, J.		
8	Preliminary injunction; bond \$2,500.00. #7 ser.6-11; #2 N.F.6-19. (N) Pine, J.		
8	Injunction undertaking of pltf. with The Home Indemnity Co. in the sum of two thousand five hundred dollars (\$2,500.00) approved. filed.		
11	Transcript of proceedings 6-5-59, Vol. I, pages 1-48; (Courts Copy) (Rep. Nevitt) filed.		
18	Answer of deft. #1 to complt; appearance of Arthur J. Hilland and James E. Hogan; Exhibits A-8 inclusive. filed.		
18	Reply of deft. #1 to counter-claim for interpleader. filed.		
18	Counter-claim of deft. #1 vs. pltf and cross-claim vs. defts. #3, #5 & #6. filed.		
18	Motion of deft. #1 to dissolve preliminary injunction; P and A; M.C. 6-18-59. filed.		
18	Motion of deft. #1 to advance and to increase pltf's. bond, P and A; M.C. 6-18-59. filed.		
18	Motion of deft. #1 for judgment on the pleadings; P&A, M.C. 6-18-59. filed.		

CIVIL DOCKET

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United States District Court for the District of Columbia

SANKIN

vs. 5410 CONN. AVE., ET AL. C. A. No. 1493-59

Supplemental Page No. 1

DATE	PROCEEDINGS	FEE	TOTAL
1959 Jun 18	Stipulation of counsel for pltf. and deft. Joseph A. Garfield extending his time to answer to an additional ten days; Appearance of Edmund D. Campbell as atty. for said deft. filed.		
Jun 18	Certificate of service 6-18-59. filed.		
Jun 18	Motion of deft. #4 to dismiss; c/m 6-18-59; P and A; M.C. 6-18-59. filed.		
✓ Jun 19	Exhibits A, B, and C of deft. #1. ✓ filed.		
Jun 19	Notice of pltf. to take deposition of deft. #4 and for production of documents; filed.		
Jun 19	Notice of pltf. to take depositions of Glenn Archer, Jr., Betty Murphy, William Schnell; c/m 6-19-59. filed.		
Jun 23	Answer of deft #3 to complt.; Cross claim vs. #1, #2, #4; c/m 6-23-59; exhibits 1, 2, 3, 4, 5, 6. (see order of Oct. 21, 1959)? filed.		
Jun 23	Opposition of deft #3 to motion of deft #4 to dismiss; c/m 6-23-59. filed.		
Jun 23	Opposition of deft #3 to motion of deft #1 to dissolve preliminary injunction; c/m 6-23-59; affidavit. filed.		
Jun 23	Memorandum of deft #3 re. motion to advance; c/m 6-23-59. filed.		
Jun 23	Opposition of deft #3 to motion for judgment on the pleadings; c/m 6-23-59. filed.		
Jun 23	Motion of deft #3 for appointment of receiver P/I. for deft. #1; P and A; c/m 6-23-59; M.C. 6-23-59. (def. #8)		
Jun 24	Reply of pltf. to counter-claim of interpleader filed by Riggs Nat. Bank, c/m 6-24-59 filed.		
Jun 24	Motion of pltf for more definite statement of counter-claim of deft. #1; P and A.; c/m 6-24-59. M.C. 6-24-59. filed.		
June 24	Opposition of pltf to motion to dissolve preliminary injunction; c/m 6-24-59; P. and A. filed.		
Jun. 24	Opposition of pltf to motion for judgment on the pleadings; c/m 6-24-59; P. and A. filed.		
Jun. 24	Opposition of pltf to motion of deft #4 to dismiss, P. and A.; c/m 6-24-59; filed.		
Jun. 24	Motion of pltf to amend caption and complt as to deft Benjamin H. Saunders (def. #4); P. and A.; c/m 6-24-59; M.C. 6-24-59. filed.		
Jun. 24	Reply of pltf to deft #1's motion to advance and opposition to motion to increase plaintiff's bond; P. and A.; c/m 6-24-59 filed.		
	(more)		

CIVIL DOCKET

United States District Court for the District of Columbia

SANTEE

5410 CONN. AVE. et al. C. A. No. 1493-59

Supplemental Page No. 2

Date	Parties	Proceedings	Filed	Trans.
Jun 24		Affidavit of pltf. filed		
Jun 24		Certificate of Service by Edward Conn, atty. for pltf. 6-24-59 filed		
Jun 25		Memorandum of deft. #3 in opposition to motion of #1 to increase Bond on Preliminary Injunction; c/m 6-24-59. filed		
Jun 26		Motion of deft. #1 for temporary restraining order; exhibits A and B; Affidavit of Dinty Warrington Whiting. filed.		
Jun 27		Motion of deft. #1 for preliminary injunction; exhibits A, and B; Affidavit; Notice; c/s 6-27-59. filed.		
Jun 27		Order setting motion for preliminary injunction for hearing on July 1, 1959 at 10:00 A.M. (N) Youngdahl, J.		
Jun 27		Order setting motion to increase bond for hearing on July 1, 1959 at 10:00 A.M. (N) Youngdahl, J.		
Jun 29		Certificate of mailing of copy of order. filed.		
Jun 30		Opposition of pltf. to motion for preliminary injunction; c/m 6-30-59; P and A; affidavit. filed.		
Jun 30		Motion of pltf. to amend complt. affidavit; c/m 6-30-59; M.C. 6-30-59. filed.		
Jun 30		Motion of pltf. to add defts; P and A; c/m 6-30-59; M.C. 6-30-59. filed.		
Jul 1		Opposition of deft. Jose A. G. rfield to motion of 5410 Conn. Ave. Corporation for Preliminary Injunction. c/m 6-30-59. filed.		
July 2		Motion of deft. #8 to make certain parties defts to counter-claim; to require parties to respond to counter-claim and interplead; to require deft. #8 to place certain stock in Registry; to dismiss as to #8 and grant #8 Costs and atty fees. P&A; c/m 7-2-59 M.C. 7-2-59 filed.		
Jul 2		Opposition of deft. #1 to motion for appointment of receiver, pendente lite; c/m 7-2-59; P&A filed.		
Jul 2		Findings of Fact and Conclusions of Law. (N) Hart, J.		
Jul 2		Order denying motion for preliminary injunction and denying motion to increase bond, both without prejudice. (N) Hart, J.		
Jul 2		Order denying motion to advance cause, without prejudice. (N) Hart, J.		
July 3		Opposition of deft. #1 to pltf's motion for more definite statement of counter-claim; c/m 7-3-59 filed		
July 3		Opposition of deft. #4 to motion to amend caption and complaint as to deft. #4; c/m 7-3-59. filed.		
		Next Page		

CIVIL DOCKET

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United States District Court for the District of Columbia

SANKIN

vs. 5410 CONN. AVE., ET AL. C. A. No. 1493-59 Supplemental Page No. 3

DATE	PROCEEDINGS	FEE	TOTAL
1959			
Jul. 6	Partial opposition of deft. #1 to motion to add defts; c/m 7-6-59. filed.		
Jul. 6	Notice of appeal of deft. #1 from order of 7-2-59; deposit of \$5.00; copies mailed to Brown and Brown; Edmund Campbell, Arthur M. Chaite, Julius Sankin and Garfield & Sankin, and Hogan and Hartson. filed.		
Jul. 6	Cost bond on appeal of deft. #1 in amount of \$250.00 with the Travelers Indemnity Co. approved. filed.		
Jul. 6	Answer of deft. #3 to cross-claim of #1; c/m 7-2-59. filed.		
Jul. 6	Notice of deft. #3 to take deposition of deft. #1; c/m 7-2-59. filed.		
Jul. 7	Order that original file be transmitted to U.S.C.A. for D.C., forthwith. (N) Letts, C.J.		
Jul. 8	Transcript of proceedings, 6-5-59, Vol. I, pages 1-48. (defts copy) (Rep. Gerald Nevitt). filed.		
Jul. 8	Record on Appeal delivered to U.S.C.A., deposit by James Hogan \$2.30. filed.		
Jul. 8	Receipt from U.S.C.A. for original papers filed. filed.		
Jul. 9	Notice of deft. #1 to take deposition of defts #5 and #6; c/m 7-8-59; filed.		
July 9	Notice of deft. #1 to take deposition of Plaintiff; c/m 7-8-59; filed.		
July 9	Notice of deft. #1 to take deposition of deft #3; c/m 7-8-59; filed.		
July 13	Opposition of deft #1 to motion of deft #8 to make certain parties defete the counter-claim for interpleader; c/m 7-13-59; filed.		
July 13	Motion of Henry W. Link, Jr., Samuel J. Betoff, Joseph Pardo, Dinty Warrington Whiting, and S. R. Winn to intervene; P. & A.; Appearance of Frost and Towers (605 Tower Bldg.) as attys for applicants; Deposit by Frost and Towers, \$5.00; Exhibit; c/m 7-13-59; Intervenor's Exhibit A. filed.		
July 16	Motion of deft #4 to dismiss; c/m 7-16-59; P & A; M.C.; filed.		
July 16	Answer of deft #1 to cross-claim of deft. #3 filed.		
July 17	Summons, copy, and copy of complt issued vs. deft. #2 n.f. 8-25 filed.		
July 17	Reply of deft. #8 to opposition of Deft. #1 to motion of deft #8 for order discharging from liability; c/m 7-16-59 filed.		
July 18	Reply of pltf. to motion of Link and others to intervene; P & A; c/m 7-15-59; filed.		
	(MORE)		

CIVIL DOCKET

United States District Court for the District of Columbia

ANKIN vs. 5410 CONN. AVE., et al. C. A. No. 1493-59 Supplemental Page No. 4

DATE	PROCEEDINGS	FEES	TOTAL
July 18	Reply of pltf to motion of deft #8 to make certain parties debts; P & A; c/m 7-15-59 filed.		
July 18	Reply of pltf to motion of deft #3 to appoint receiver; P & A; c/m 7-15-59 filed.		
July 17	Consent order granting motion of Riggs National Bank (deft. #8) for order to deposit into Registry of the Court and authorizing the deposit in the Registry of the Court of certain shares of stock and discharging Riggs National Bank from liability and that cause is dismissed with prejudice against Riggs National Bank (deft. #8); Jurisdiction retained to fix award to said deft. for attorney's fees and expenses. (N) Letts, C. J.		
July 20	Deposit into the Registry by the Riggs National Bank of Washington, D.C., two certificates of stock pursuant to order of Court filed July 17. filed.		
July 23	Deposition of William N. Schnell by pltf; (\$58.40) filed.		
July 23	Deposition of Benjamin H. Saunders by pltf (\$150.40) filed.		
July 23	Motion of pltf to quash notice of deposition or to continue deposition dates; P & A; c/m 7-23-59; L.C. filed.		
July 24	Motion of deft #1 to dismiss complt of pltf; c/m 7-23-59; P & A; filed.		
July 24	Verification of answer of Joseph Pardo, Secretary, 5410 Connecticut Avenue, Corp. to complaint; and reply to cross-claim; c/m 7-23 filed.		
July 24	Notice by deft #1 for taking deposition of deft Garfield and Sankin Inc., by its officers and directors, Julius Sankin and Arthur M. Chaite (deft. #5) and the deposition of deft Julius Sankin Inc., (deft. #6) by its officers and directors, Julius Sankin and Arthur M. Chaite; c/m 7-23-59; filed.		
July 24	Notice by deft. #1 for taking deposition of pltf; c/m 7-23-59; filed.		
July 24	Notice by deft #1 for taking deposition of deft. Joseph Garfield (deft. #3); c/m 7-23-59; filed.		
July 28	Motion of deft #3 to quash notice of taking deposition or in the alternative, to continue date for taking thereof; affidavit; P & A; notice; c/m 7-28 filed.		
July 29	Opposition of pltf to motion to dismiss; P & A; c/m 7-28; filed.		
July 30	Transcript of proceedings 6-8-59, Vol I, pp. 1-18 (Rep. Sweet) File Copy; filed.		
	(Continued)		35

CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN

vs. 5410 CONNECTICUT AVE. C. A. No. 1493-59

Supplemental Page No. 5

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DATE	PROCEEDINGS	FEE	TOTAL
1959 July 30	Transcript of proceedings 7-1-59; Vol. 1, pp. 1-53; (Reporter D. F. Sweet); File Copy filed		
Aug. 4	Order denying motion of deft. Garfield to quash notice of taking deposition and granting motion to continue date of taking of deposition. (N) Hart, J.		
Aug. 18	Deposition of Joseph Pardo; pp. 1-29 incl. filed		
Sep. 25	Notice by deft #1 to take deposition of deft #3; c/m 9-22-59. filed		
Sep. 30	Notice of levy, advising it is now due, owing and unpaid from James T. Benn, c/o Robert M. Morgan, C.P.A., Miami, Florida to the U.S.A. in the amount of \$446,342.26. filed	7	
Oct. 8	Withdrawal of motion of pltf to quash notices of deposition or to continue case. (fiat) Matthews, J.		
Oct. 8	Withdrawal of motion of pltf to add parties heretofore filed (June 30, 1959) (fiat) Matthews, J.		
Oct. 8	Withdrawal of motion of deft #1 to dismiss complt. (fiat) Matthews, J.		
Oct. 8	Withdrawal of motion of deft #1 for appointment of reciever for 5410 Conn. Ave. Corporation. (fiat) Matthews, J.		
Oct. 8	Intervening complaint of Harry W. Link, Jr., Samuel J. Betoff, Joseph Pardo, Dinty Warmington Whiting, and S. R. Winn; vs. deft #3; exhibit; c/m 7-13-59. (fiat) Matthews, J.		
Oct. 21	Order denying pltf's motion for more definite statement of counter-claim of deft #1. (N) Matthews, J.		
Oct. 21	Order dismissing cross-claim of Joseph A. Garfield (deft #3) vs. Benjamin H. Saunders (deft #4) with prejudice. (N) Matthews, J.		
Oct. 21	Order denying motion of deft #1 to dissolve preliminary injunction. (N) Matthews, J.		
Oct. 21	Order denying motion of deft #4 to dismiss complaint. (N) Matthews, J.		
Oct. 21	Order denying motion of deft #1 for judgment on pleadings. Matthews, J.		
Oct. 21	Order granting motion of pltf to amend caption and complaint reflecting that deft Saunders (#4) is sued individually as well as secretary of corporation. (N) Matthews, J.		
Oct. 21	Order denying motion of pltf to add defts. (N) Matthews, J.		
Oct. 21	Order granting motion of Harry W. Link, Jr., Samuel J. Betoff, Joseph Pardo, Dinty Warmington Whiting, and S. R. Winn to intervene. (N) Matthews, J.		
Oct. 21	Order amending complaint by substituting name of Samuel Betoff for Jerry Betoff; by adding paragraph; by amending prayer. (see order for details) (N) Matthews, J. (N) Matthews, J.		34

CIVIL DOCKET

United States District Court for the District of Columbia

KIN vs. 5410 CONN. AVE. C. A. No. 1493 - 59 Supplemental Page No. 6

DATE	PROCEEDINGS	FEES	TOTAL
Oct 28	Motion of counsel for debt #1 to withdraw appearance; consent of debt #1. filed		
Oct 28	Answer of pltf to counter-claim of debt #1; c/m 10-27-59. filed		
Oct 29	Consent order granting leave to Arthur J. Hilland, Ferdinand J. Mack, and James E. Hogan to withdraw as attorneys for debt 5410 Conn. Ave. Corp. (M) Keech, J. filed		
Nov 2	Withdrawal of appearances of Hilland, Mack, Hogan as per above order. filed		
Nov 4	Motion of debt #4 to dismiss amended complt; P & A; c/m 11-4-59; M.C. 11-4-59. Appearance of Ferdinand J. Mack and James E. Hogan as attys for debt #4. filed	✓	
Nov 16	Certified copy of order of U. S. Court of Appeals dismissing appeal; appellees to recover from appellant taxable costs on appeal. filed		
Nov 19	Return of original record from U. S. C. A. for D. C. filed		
Nov 27	Deposition of pltf by debt; \$124.30. filed		
Nov 30	Deposition of Glenn Archer, Jr. and Betty Murphy, 6-26-59. by plaintiff. filed		
Dec 10	Cause and amended complaint against Benjamin Saunders dismissed by consent and without prejudice per counsel. (fiat Matthews, J.) filed		
Dec 24	Deposition of Intervenor #5 by debt #3; \$152.90. filed		
6	Motion of pltf for authority to permit and authorize payment of Sach's salary; P & A; c/m 1-5-60; M.C. 1-6-60. filed		
13	Opposition of intervenors to pltf's motion for authority to permit and authorize payment of back salary; c/m 1-8-60. filed		
15	Affidavit of Arthur Chait; c/m 1-14-60. filed		
19	Affidavit of Moses Goldwyn; c/s 1-19-60. filed		
19	Motion for authority to permit payment of back salary argued and taken under advisement. (Rep. T. O'Neal). Curran, J.		
27	Order authorizing pltf to receive against his claim for back pay from Garfield and Sankin Inc. in the sum of \$18,433.33 on condition that pltf deposit \$12,500.00 cash into Registry of Court or file a bond in sum of \$12,500.00 (N) Curran, J.		
			97

CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN vs. 5410 CONNECTICUT AVE C. A. No. 1493-59 Supplemental Page No. 2

DATE	PROCEDURES	FILED	TOTAL
1960			
Feb. 3	Motion of Riggs National Bank for allowance of attorney's fee; P & A; affidavit; c/m 2-3-60; M.C. filed		
Feb. 5	Undertaking of pltf. in sum of \$12,500.00 with Peerless Insurance Co. approved. Letts, J. filed		
Feb. 11	Appearance of Arthur M. Chaite for defts 5 & 6. filed		
Feb. 11	Motion of plf. to strike answer, counter-claim & pleadings of deft. #1 & to enter judgment for pltf. vs deft. #1; P & A; c/m 2-11-60; M.C. 2-11-60. filed		
Feb. 15	Opposition of intervenor to motion of Riggs National Bank for allowance of attorney's fees; memorandum; c/m 2-12-60. filed		
Feb. 15	Appearance of Donohue and Kaufman as attys for deft #1. filed		
Feb. 20	Opposition of pltf to motion of Riggs National Bank for allowance of atty's fees vs pltf; P & A; c/m 2-19-60. filed		
Feb. 18	Notice of deft #3 to take deposition of intervenor #2; c/m. filed		
Feb. 18	Notice of deft #3 to take deposition of intervenor #1; c/m. filed		
Mar. 11	Withdrawal of pltf's motion to strike per atty for pltf. filed		
Mar. 14	Order granting motion of the Riggs National Bank (deft #8) for the allowance of its Atty's Fees in the amount of \$3,500.00; and granting said deft a lien against the stock certificates of Garfield and Sankin, Inc., and Julius Sankin, Inc. deposited in the Registry of the Court until atty's fees have been paid. (N) Youngdahl, J.		
Mar. 15	Notice of deft 3 to take deposition of intervenor Betoff; c/m 3-14-60 filed.		
Mar. 15	Notice of deft (3) to take deposition of intervenor Link; c/m 3-14-60 filed.		
Apr. 8	Deposition of Harry T. Link, Jr. by deft Joseph Garfield; \$150.70. filed.		
Apr. 8	Deposition of Samuel J. Betoff by deft Joseph Garfield; \$105.60. filed.		
Apr. 29	Deposition of Garfield and Sankin, Inc. and Julius Sankin, Inc. by Arthur M. Chaite; \$104.30 paid by deft 5410 Conn Ave filed.		
Jun. 14	Motion for appointment of a person to serve process filed.		
Jun. 14	Order appointing Hugh Duffy Special Process Server. (N) Tamm, J.		
Jun. 17	Summons, copy and copies of complt; motion for preliminary injunction and answer and cross claim of deft Garfield issued to deft #2. ser 6-20-60		

CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN

5410 Conn. Ave

C. A. No. 1493-59

Supplemental Page No. 8

	Proceedings	Fees	Total
23	Notice of pltf to take deposition of James T. Benn; c/m 6-22-60. filed.		
7	Motion of deft James T. Benn to quash return of service of process; P & A; Affidavit in support; c/m 7-7-60 M. C. 7-7-60 filed.		
12	Opposition of pltf. to Motion of deft. #2 to quash return of service; P & A; c/m 7-12-60. filed.		
12	Notice of pltf. to take deposition of deft. #2; c/m 7-12-60. filed.		
19	Opposition of deft #3 to motion of deft #2 to quash service; exhibits 1 and 2; c/m 7-18-60 filed.		
20	Motion of deft #2 to strike notice of taking deposition; P & A c/m 7-20-60; M. C. 7-20-60 filed.		
25	Notice of deft Garfield to take deposition of Edna S. Downey; c/m 7-25-60 filed.		
17	Exhibit "A" of deft James T. Benn. filed.		
17	Withdrawal of notice to take deposition of deft Benn, without prejudice per counsel for pltf filed.		
24	Order denying motion of deft #2 to quash service of process; answer to be filed within 20 days. (N) Hart, J.		
8	Renewed Motion of deft. James T. Benn to quash return of service; C/M 9/8/60; P&A; M. C. 9/8/60; Affidavits (2). filed.		
15	Opposition of Pltff to renewed Motion of deft James T. Benn to quash return of service of Process; P&A; c/m 9/15/60. filed.		
16	Deposition of Edna S. Downey by deft. Garfield; Published & filed.		
3	Affidavit of John G. Nicholson in opposition to motion of James T. Benn to quash service of process; c/m 9/30/60? filed.		
11	Order denying renewed motion for deft James T. Benn to quash service of process; granting deft Benn 20 days within which to file answer. (N) Hart, J.		
19	Answer of deft. #2 to complt; & to cross-claim of #3; cross-claim vs #1; c/m 11-18-60; exhibits 1, 2 & 3; app. Munter, Adams, Thompson & Bastian. filed		
29	Notice by pltf to take deposition of James T. Benn; c/m 11-28-60 filed		
6	Answer of deft #3 to cross-claim of deft #2; c/m 12-2-60. filed		
	see next page		

CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN

5410 Conn. Ave.

C. A. No. 1493-59

Supplemental Page No. 9

1961	Date	Proceedings	Fees	Totals
Jan.	4	Deposition of James T. Benn, 12-6-60. filed.		
Jan.	4	Deposition of James T. Benn, 12-7-60. filed.		
Jan.	4	Deposition of James T. Benn, 12-8-60. filed.		
Jan.	4	Deposition of James T. Benn, 12-9-60. filed.		
Mar.	10	Notice of deft. #2 to take deposition of plttf. Julius Sankin; c/m 2-24. filed.		
Apr.	21	Deposition of James T. Benn, March 1, 2, 3, 14, 15 and 16; (cost \$1077.60). filed.		
May	6	First notice under Rule 13		
May	6	Deposition of Joseph A. Garfield by deft. #1; \$250.80. filed.		
May	19	Motion of plttf. to place on ready calendar; P & A; c/m 5-18; M.C. filed.		
May	23	Opposition of intervenors to motion to place cause on Ready Calendar; c/m 5-23-61; P & A. filed.		
May	24	Opposition of deft. No. 2 to motion to place cause on ready calendar; c/m 5-23-61. filed.		
June	14	Notice by deft. James T. Benn to take deposition of plttf; c/m 6-13-61. filed.		
June	22	Order denying motion to place cause on ready calendar forthwith; allowing parties to certify cause on ready calendar on or before November 1, 1961, providing case is at issue and allowing parties to complete discovery and file pleadings or motions by November 1, 1961. AC/N (N) Youngdahl.		
Jul	3	Appearance of Joseph Pardo pro se; c/mailing filed		
Jul	3	Motion of Joseph Pardo, intervenor, to amend complt of intervenor; P&A; c/mailing; Exh. A filed		
Jul	7	Motion of deft. Garfield to strike notice of appearance of Joseph Pardo; P&A; c/m 7/6/61; M.C. 7/7/61 filed		
Jul	10	Motion of plttf to quash notice to take deposition and continue same and to quash portions of subpoena; notice; P&A; c/m 7/7/61 filed		
Jul	10	Order denying motion to quash notice of taking deposition of Moses Goldwyn on condition that one counsel examine witnesses for intervenors; denying motion to quash subpoena duces tecum served on Moses Goldwyn as it relates to personal income tax returns (N) micro 7/11/61 Tamm, J.		
Jul	11	Withdrawal of John A Beck and Frost & Towers as attys for intervenor Joseph Pardo; appearance of Joseph Pardo in proper person SEE NEXT PAGE (Plat) Keach, J.		

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CIVIL DOCKET

United States District Court for the District of Columbia

vs. 5110 CONN. AVE. ET AL C. A. No. 1493-59 Supplemental Page No. 10

DATE	PROCEEDINGS	FEE	TOTAL
12	Motion of deft #1 to compel answers to questions on deposition: P&A; c/m 7/10/61 M.C. 8/8/61 filed	1.	
12	Reply of intervenor to motion to strike notice of appearance of Joseph Pardo: P&A: c/m 7/10/61 filed		
12	Motion of Joseph Pardo, intervenor, to produce: P&A: c/m 7/10/61 M.C. 8/8/61 filed		
13	Opposition of deft Joseph A. Garfield to motion of intervenor Joseph Pardo, pro se, to amend complt: c/m 7/12/61 filed		
13	Notice by pltf to take deposition of Dinty Whiting: c/m 7/12/61-filed		
13	Motion of pltf for production and inspection: P&A: c/m 7/12/61: M.C. 7/13/61 filed		
13	Motion of pltf to dismiss vs. defts Arthur Chalte and Garfield & Sankin, Inc., and Julius Sankin, Inc: P&A: c/m 7/12/61: M.C. 7/13/61 filed		
13	Motion of pltf for production and inspection: P&A: c/m 7/12/61: M.C. 7/13/61 filed		
14	Reply of Joseph Pardo to motion for production of documents: P&A: c/m 7/13/61 filed		
14	Notice of delivery of pleadings: c/m 7/12/61 filed		
17	Motion of pltf to compel answers to questions on deposition of Joseph Pardo: P&A: c/m 7/17/61: M.C. 7/17/61 filed		
17	Opposition of pltf to motion to amend complt of intervenor, Joseph Pardo: P&A: c/m 7/17/61 filed		
17	Opposition of pltf to motion to produce for discovery and things for inspection, copying and photographing: P&A: c/m 7/17/61 filed		
17	Reply of pltf to motion to strike notice of appearance of Joseph Pardo: P&A: c/m 7/17/61 filed		
17	Motion of pltf to compel answers to questions on deposition of James T. Bern: P&A: c/m 7/17/61: M.C. 7/17/61 filed		
17	Motion of pltf to strike motion to compel answers to question on deposition filed by Joseph Pardo: P&A: c/m 7/14/61: M.C. 7/17/61 filed		
17	Motion of pltf to compel answers to questions on deposition of Dinty Whiting: P&A: c/m 7/17/61: M.C. 7/17/61 filed		
	SEE NEXT PAGE		

CIVIL DOCKET

United States District Court for the District of Columbia

SARLIN

510 CONN. AVE. CORP ET AL A. No. 1493-59

Supplemental Page No. 11

Date	Parties	Particulars	Filed	Trans.
1961				
Jul 18		Motion of Joseph Pardo to compel Moses Goldwyn to produce documents for inspection and copying; citation for contempt and motion to compel defts #6 & 7 to direct that documents be produced for inspection & copying; c/m 7/13/61 M.C. 8/8/61 filed		
Jul 19		Reply of Joseph Pardo to pltf's motion to dismiss as to defts 5, 6 & 7: c/m 7/18/61 filed		
Jul 19		Reply of Joseph Pardo to pltf's motion for production and inspection of documents: c/m 7/18/61 filed		
Jul 19		Motion of Joseph Pardo to compel answers to questions on deposition; c/m 7/18/61 M.C. 8/8/61 filed		
Jul 20		Opposition of intervenors to pltf's motion to dismiss as to defts 5, 6 & 7; P&A; c/m 7/14/61 filed		
Jul 20		Opposition of intervenors to pltf's motions for production and inspection of documents; P&A; c/m 7/14/61 filed		
Jul 22		Objection of Joseph Pardo to pltf's motion to compel answers to questions on deposition; c/m 7/21/61 filed		
Jul 22		Opposition of pltf to motion to compel answers to questions on deposition filed by Joseph Pardo, intervenor. P&A; c/m 7/20/61 filed		
Jul 22		Motion of Joseph Pardo, intervenor, to compel return of \$73,000.00 by pltf and \$7,000.00 by debt #7 and to increase bond & for monthly accountings by pltf: P&A; c/m 7/21/61 M.C. 8/8/61 filed		
July 26		Deposition of Edward A. Hitchell, Jr. by Intervenor. (\$25.00) filed		
Jul 27		Answer of debt #7 to amended complt of intervenor, Joseph Pardo; c/m 7/26/61; Appearance of H. Nathaniel Blaustein filed		
Aug 2		Appearance of Hilland, Mack & Hogan as counsel for debt #1 filed		
Aug 2		Withdrawal of appearance of Donohue & Kaufman as attys for debt #1 filed		
Aug 8		Opposition of debt Arthur M. Chaite to motion to compel return of \$73,000.00, etc.; c/m 8/7/61 filed		
Aug 10		Deposition of Ellis Miller, 7/11/61 (\$12.50 pd by intervenors #1, #2, #4 and #5) filed		
Aug 11		Motion of debt #1 to quash pltf's notice of resumption of oral deposition; c/m 8/10/61; P&A; M.C. 8/11/61 filed		
Aug 11		Motion of Intervenor #4 to quash deposition; P&A; c/m 8/9/61; Affidavit: M.C. 8/11/61 filed		
		see next page		42

CIVIL DOCKET

United States District Court for the District of Columbia

IN _____ at _____ 510 Conn. Avenue C. A. No. 1493-59 Supplemental Page No. 12

	PROCEDURES	Fees	TOTAL
15	Motion of deft #1 to compel pltf to answer questions; c/m 8-14-61; P & A; M.C. 8-15-61. filed		
15	Opposition of deft #1 to pltf's motion to dismiss complaint against Arthur Chaite et al; c/m 8-14-61. filed		
25	Motion of Intervenor's. Link, Betoff, Whiting & Winn to compel pltf to answer questions on deposition; P&A; c/m 8/24/61; M.C. 8/25/61 filed		
25	Motion of Intervenor's. Link, Betoff, Winn & Whiting, for discovery and production or for appointment of special master or auditor; P&A; c/m 8/24/61; M.C. 8/25/61 filed		
25	Motion of Intervenor's. Link, Betoff, Whiting & Winn, for summary judgment or to dismiss counterclaim of deft Joseph A. Garfield; P&A; c/m 8/24/61; Statement of facts M.C. 9-8-61 filed		
1	Motion of deft #1 for leave to file amended counterclaim and cross-claim; c/m 8/31/61; P&A; Exh A; M.C. 9/1/61 filed		
5	P&A of deft #3 in opposition to motion of intervenors for summary judgment, or, in alternative, to dismiss the cross-claim of deft #3; c/m 8/31/61 filed		
6	Deposition of Moe Goldwyn on 7-11-61 by intervenors; \$166.40. filed		
9	Opposition of pltf to motion to compel return of \$73,000.00 and to increase bond and for monthly accountings; P & A; c/m 9-7-61; affidavit; exhibit. filed		
9	Reply of pltf to motion of intervenors for summary judgment; c/m 9-7-61. filed		
9	Opposition of pltf to intervenor's motion for production; c/m 9-7-61. filed		
9	Opposition of pltf to motion to quash pltf's notice to take deposition of Dinty Warrington Whiting; P & A; c/m 9-7-61. filed		
9	Opposition of pltf to motion of intervenors to compel pltf to answer questions on depositions; P & A; c/m 9-7-61. filed		
9	Certificate of service 9-7-61. filed		
14	Opposition of deft #2 to motion to dismiss as to defts 5, 6, and 7; P & A; c/m 9-12-61. filed		
23	Opposition of deft #2 to pltf's motion to compel answers to interrogatories; P&A; c/m 9-22-61. filed		
27	Deposition of William H. Wiegering by intervenors; \$75.20; Exhibits 1-23 inclusive. filed		43

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CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN

vs. 5410 -CONNECTICUT AVE

C. A. No. 1493-59

Supplemental Page No. 13

DATE	PROCEEDINGS	Fees	TOTAL
Oct 2	Motion of deft #2 to compel answers to questions propounded to pltff; P&A; c/m 10-2-61; M.C. filed		
Oct 2	Notice of deft #2 to take deposition of #3; c/m 10-2-61. filed		
Oct 3	Notice by deft #1 to take deposition of pltff; c/m 10-2-61. filed		
Oct 5	Motion of deft #3 to quash notice of deft #2 to take deposition of deft #3; P&A; c/m 10/5/61; M.C. 10/5/61 filed		
Oct 5	Answer of pltf to intervenors' complt; c/m 10/5/61 filed		
Oct 5	Opposition of pltf to motion of deft #1 for leave to file amended counterclaim; P&A; c/m 10/5/61 filed		
Oct 5	Opposition of pltf to motion of deft #2 to compel answers; P&A; c/m 10/5/61 filed		
Oct 5	Certificate of service of oppositions and answer filed		
Oct 5	Motion of pltf to quash notice to take deposition of pltf; c/m 10/5/61; M.C. 10/5/61 filed		
Oct 14	Motion of deft for summary judgment; c/m 10-13-61; P&A; statement of facts; M.C. 10-14-61 filed		
Oct 14	Motion of deft for preliminary injunction or to vacate order of 7-29-59; c/m 10-13-61; P&A; M.C. 10-14-61 filed		
Oct 18	Opposition of pltf to motion for preliminary injunction etc; P & A; c/m 10-17-61. filed		
Oct 18	Reply of pltf to motion for summary judgment; c/m 10-17-61. filed		
Oct 19	Opposition of pltf to motion to compel answers filed by deft #1; P&A; c/s 10-19-61 filed		
Oct 19	Opposition of pltf to motion to compel Moses Goldwyn to produce documents; P & A; c/s 10-19-61 filed		
Oct 27	Motion of deft #1 for summary judgment; c/m 10-26-61; P&A; Statement of facts; M.C. 10-27-61 filed		
Nov 6	Answer of deft Garfield (#3) to intervenors complaint; c/m 11-2-61 filed		
Nov 9	Opposition of pltf to motion for summary judgment; statement of facts; P & A; c/m 11-8-61. filed		
Nov 13	Certificate of service of proposed orders by atty for pltf; notice. filed		
Nov 14	Notice of presentation of orders; c/m November 9, 1961. filed		
Nov 14	Order denying motion to direct Julius Sankin to answer certain questions on his deposition (X) Holtzoff, J. W		
	-see next page-		

CIVIL DOCKET

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United States District Court for the District of Columbia

at 5410 Conn. Ave. C. A. No. 1493-59 Supplemental Page No. 12

	Particulars	Page	Total
14	Order denying motion of Joseph Pardo to compel Moses Goldwyn to produce documents. (N) Holtzoff, J.		
14	Order denying motion of 5410 Connecticut Avenue Corporation for summary judgment vs debt Joseph A. Garfield on cross-claim. (N) Holtzoff, J.		
14	Order denying motion of intervenors Link, Batoff, Whiting and Winn for summary judgment vs debt Joseph A. Garfield on cross-claim or in the alternative to dismiss cross-claim. (N) Holtzoff, J.		
14	Order denying motion of intervenor Whiting to quash notice of taking his deposition; directing deposition be taken. (N) Holtzoff, J.		
14	Order denying motion of Intervenor to direct pltf to answer questions on deposition in all respects except that pltf is directed to answer a certain question. (N) Holtzoff, J.		
14	Order denying motion of Joseph Pardo to direct return of \$73,000.00 by Julius Sankin and \$7,000.00 by Arthur M. Chait and to increase bond and for monthly accountings by Julius Sankin. (N) Holtzoff, J.		
14	Order denying motion for leave to file amended counterclaim and crossclaim by debt 5410 Connecticut Avenue Corporation. (N) Holtzoff, J.		
14	Order granting in part motion of debt Benn to compel answers to questions propounded on deposition of pltf Julius Sankin. (N) Holtzoff, J.		
14	Order denying motion of 5410 Connecticut Avenue Corporation for a preliminary injunction. (N) Holtzoff, J.		
14	Order denying motion of debt 5410 Connecticut Avenue Corporation to compel pltf to answer questions on deposition propounded by oral deposition in part, and granting such motion in part. (N) Holtzoff, J.		
14	Order denying motion for leave to amend complaint of intervenor Joseph Pardo. (N) Holtzoff, J.		
14	Order denying motion to produce and production of documents filed by Joseph Pardo. (N) Holtzoff, J.		
-see next page-			

CIVIL DOCKET

United States District Court for the District of Columbia

SANKIN

vs. 5410 Conn. Avenue

C. A. No. 1493-59

Supplemental Page No. 15

1961	DATE	PROCEDURES	FEES	TOTAL
Nov	14	Order denying motion of intervenors for discovery and production of documents for inspection, copying or photographing, or in the alternative, appointment of Special Master or Auditor. (N) Holtzoff, J.		
Nov	14	Order granting pltf's motion to dismiss complaint vs debts Arthur E. Chaite, Garfield and Sankin, Inc. and Julius Sankin, Inc. and dismissing complaint without prejudice vs said debts. (N) Holtzoff, J.		
Nov	21	Motion of Joseph Pardo to compel answer of pltf's to questions on deposition; P&A; c/m 11-20-61 filed		
Nov	25	Notice of debt #2 to take deposition of Julius Sankin; c/m 11-24-61 filed		
Dec	6	Motion of James T. Benn, debt. to consolidate with C.A. 4002-60; c/m 12-5-61; P&A: M.C. 12-6-61 filed		
Dec	9	Opposition of pltf to motion to compel answers to questions on deposition; c/m 12- -61; P A filed		
Dec	13	Notice by debt, James T. Benn, to take deposition of debt, Joseph A. Garfield; c/m 12-13-61. filed		
Dec	14	Notice by debt James T. Benn to take deposition of Janet Garfield; c/m 12-14-61 filed		
Dec	15	Notice by pltf to take deposition of Dinty Whiting; c/m 12-14-61 filed		
Dec	20	Notice of intervenors to take deposition of Janet Garfield; c/m 12-15-61 filed		
Dec	22	Order consolidating CA 4002-60 and CA 1493-59 AC/N (N) McGarraghy, J.		
1962				
Jan	9	Calendered (N) (as of November 14, 1961)		
Jan	10	Order denying motion of 5410 Connecticut Avenue Corporation for Summary Judgment (N) By Direction: Curran, J. filed		
Jan	12	Deposition of Dinty Warminston Whiting filed		
Jan	13	Certificate of Readiness by pltf; c/m 1-12-62 filed		
Feb	1	Deposition of Joseph A. Garfield filed		
Feb	1	Deposition of Joseph A. Garfield, part II filed		
Mar	1	Deposition of Dinty Warminston Whiting, 7-22-59: \$140.00 filed		
Mar	1	Deposition of pltf, 6-24-61; exhibits #1 thru 7; \$ 150.00 filed		
Mar	1	Deposition of pltf, 11-9-61; \$ 52.00 filed		
		over		

CIVIL DOCKET

United States District Court for the District of Columbia

vs. 5410 Conn. Ave. Corp. C. A. No. 1103-52 Supplemental Page No. 16

No.	Proceedings	Fees		TOTAL
15	Motion of Hillard, Mack & Hogan for leave to withdraw appearance; no objection of client; c/m 3-14-62 filed			
16	Order granting leave to Hillard, Mack & Hogan to withdraw appearance as attys for deft. 5410 Conn. Ave. Corp. (AC/N) (N) Sirica, J. filed			
13	Appearance of Nicholas J. Chase for deft 5410 Conn. Ave. Corp (AC/N) filed			
1	Pretrial Proceedings. (5-29-62) Assistant Pretrial Examiner			
5	Objection of plaintiff Sankin to pretrial order; P&A; c/m 6-5-62; M.C. 6-5-62. filed			
5	Objections of defendant James T. Benn to pretrial order; c/m 6-5-62; M.C. 6-5-62. filed			
5	Objections of intervenor to pretrial order; c/m 6-5-62; P&A; M.C. 6-5-62. filed			
12	Response of deft Garfield to objections of deft Benn to pretrial order; c/m 6-11-62. filed			
12	Response of deft Garfield to objections of intervenor to pretrial order; c/m 6-11-62. filed			
12	Response of pltf to intervenors' objection to pretrial order; P&A; c/m 6-12-62 filed			
12	Response of pltf to deft Benn's objections to pretrial order; c/m 6-12-62. filed			
15	Response of deft #1 to objections of pltf. Sankin & deft. Garfield; c/m 6-14-62. filed			
18	Transcript of proceeding 11-6-61, Vol. I, pages 1-7. (Rep. by Gerald Nevitt.) Court copy. filed			
3	Order amending pretrial order: plaintiff may file a motion for leave to demand a jury trial within 20 days of date of this order (AC/N). (N) Jones, J.			
1	List of names of witnesses by defendant James T. Benn; c/m 7-31-62. filed			

SANKIN



BENN

v.

GARFIELD

Civil Action No. 1493-59

Civil Action No. 4002-60

These consolidated cases having come on for trial by the Court without a jury and the Court, with respect to the liability issues, having heard and considered the evidence adduced and, with respect to the issues of compensatory damages referred to a Special Master, the Court having considered the report, findings of fact and conclusions of law of the Special Master and the objections and related motions, and the Court having considered the issues of punitive damages, attorneys' fees and costs, as well as arguments and briefs of counsel with respect to all the issues, and having filed its written opinion in which the Court's findings of fact and conclusions of law appear, it is this 18th day of January, 1968,

(1) The complaint in intervention of intervenor-defendants Joseph Pardo, Dinty Whiting, Samuel J. Beto, S. R. Winn and Aileen A. Link, Executrix of the estate of Harry W. Link, deceased, against plaintiff Julius Sankin be and the same is hereby dismissed with prejudice and with costs;

--

(2) The counterclaim of defendants Dinty Whiting, Samuel J. Betoﬀ, S. R. Winn and Aileen A. Link, Executrix of the estate of Harry W. Link, deceased, against plaintiff Julius Sankin be and the same is hereby dismissed with prejudice and with costs;

(3) The counterclaim of defendant Joseph Pardo against plaintiff Julius Sankin be and the same is hereby dismissed with prejudice and with costs;

(4) The complaint in intervention of intervenor-defendants Joseph Pardo, Dinty Whiting, Samuel J. Betoﬀ, S. R. Winn and Aileen A. Link, Executrix of the estate of Harry W. Link, deceased, against defendant Joseph A. Garfield be and the same is hereby dismissed with prejudice and without costs;

(5) The counterclaim of defendant 5410 Connecticut Avenue Corporation against plaintiff Julius Sankin be and the same is hereby dismissed with prejudice and with costs;

(6) The cross-claim of defendant 5410 Connecticut Avenue Corporation against defendant Garfield and Sankin, Inc. and defendant Julius Sankin, Inc. be and the same is hereby dismissed with prejudice and with costs;

(7) The cross-claim of defendant 5410 Connecticut Avenue Corporation against defendant Joseph A. Garfield be and the same is hereby dismissed with prejudice and without costs;

(8) The cross-claim of defendant Joseph A. Garfield against defendant James T. Benn and defendant 5410 Connecticut Avenue Corporation be and the same is hereby dismissed with prejudice and without costs;

(9) The cross-claim of defendants Joseph Pardo, Dinty Whiting, Samuel J. Betoff, S. R. Winn and Aileen A. Link, Executrix of the estate of Harry W. Link, deceased, against defendant James T. Benn be and the same is hereby dismissed with prejudice and without costs;

(10) The cross-claim of defendant James T. Benn against Joseph A. Garfield be and the same is hereby dismissed with prejudice and without costs;

(11) The complaint of plaintiff James T. Benn in Civil Action 4002-60 against defendant Janet Garfield be and the same is hereby dismissed with prejudice and without costs;

(12) The 66-2/3 shares of Garfield and Sankin, Inc. capital stock and of the 66-2/3 shares of Julius Sankin, Inc. capital stock, formerly owned by defendant Joseph A. Garfield are declared to be as of and ever since May 26, 1959 the property of plaintiff Julius Sankin as a result of his purchase of said stock on that date from defendant Joseph A. Garfield;

(13) There is hereby awarded to plaintiff Julius Sankin, as compensatory damages against defendant Joseph A. Garfield, the sum of \$423,521.00, which sum shall be credited by defendant Garfield as payment on the \$800,000.00 purchase price of the 66-2/3 shares of Garfield and Sankin, Inc. capital stock and 66-2/3 shares of Julius Sankin, Inc. capital stock, agreed to by plaintiff Sankin as evidenced by his three non-interest bearing promissory notes of May 26, 1959;

(14) Plaintiff Julius Sankin is to pay into the Registry of the Court, within 10 days of the date of this judgment, \$376,479.00 as the balance owed by him to defendant

Joseph A. Garfield on the purchase price for the above mentioned shares of capital stock;

(15) Defendant Joseph A. Garfield shall deposit with the Registry of this Court, within 10 days of the date of this judgment, the three non-interest bearing promissory notes made by plaintiff Julius Sankin on May 26, 1959 in which defendant Garfield is named as payee and which total \$800,000.00;

(16) Defendant Joseph A. Garfield shall deposit with the Registry of this Court, within 10 days of the date of this judgment, properly executed instruments assigning to plaintiff Julius Sankin the 66-2/3 shares of Garfield and Sankin, Inc. capital stock and the 66-2/3 shares of Julius Sankin, Inc. capital stock, as well as any other documents that may be necessary to effectuate the cancellation of the certificates of the mentioned stock now in the name of defendant Joseph A. Garfield and the issuance by the corporations of certificates evidencing the ownership of said shares of stock in the name of plaintiff Julius Sankin;

(17) The Clerk of the Court shall, upon the payment into the Registry of the Court of \$376,479.00 by plaintiff Sankin, deliver to him the stock certificates for 66-2/3 shares of Garfield and Sankin, Inc. capital stock and for 66-2/3 shares of Julius Sankin, Inc. capital stock, which stock certificates were deposited with the Registry of the Court by The Riggs National Bank of Washington, D. C. pursuant to an order of this Court entered in Civil Action 1493-59 on July 17, 1959; and the Clerk of the Court shall also deliver to plaintiff Sankin the assignments and any other instruments executed by defendant Garfield

pursuant to this judgment, as well as the three promissory notes that defendant Garfield is by this judgment ordered to deposit with the Registry of the Court;

(18) The \$3500.00 allowed The Riggs National Bank as expenses for attorneys' fees by a March 14, 1960 order of this Court in Civil Action 1493-59 be and the same is hereby assessed as damages against defendant Joseph A. Garfield, defendant James T. Benn and defendant 5410 Connecticut Avenue Corporation; if within 10 days after the date of this judgment there is not deposited with the Registry of the Court a receipt executed by The Riggs National Bank evidencing the payment of said \$3500.00 to it, the Clerk of this Court shall pay to the Bank and take its receipt for \$3500.00, which sum the Clerk of the Court shall pay from the \$376,479.00 to be deposited with the Registry of the Court by plaintiff Sankin; in the event that the Clerk of the Court shall pay said \$3500.00 to the Bank, such payment shall not extinguish such rights as defendant Garfield may have for contribution by defendant Benn and defendant 5410 Connecticut Avenue Corporation;

(19) William J. Durkin's account filed herein of expenses incurred by him as the Special Master appointed herein, which total \$3165.62, is hereby approved;

(20) As compensation for his services as Special Master in this case, William J. Durkin is awarded the sum of \$21,750.00, which sum is hereby charged against defendants Joseph A. Garfield, James T. Benn, 5410 Connecticut Avenue Corporation, Joseph Pardo, Dinty Whiting, Samuel J. Betoff, S. R. Winn and Aileen A. Link, Executrix of the estate of Harry W. Link, deceased; \$834.38, the balance remaining in the possession of

William J. Durkin, as Special Master, after he had deducted from the \$4000.00 deposited with him by some of the parties the \$3165.62 expenses incurred, shall be retained by him and credited on the \$21,750.00 awarded him as compensation; the Clerk of the Court upon receiving a receipt from William J. Durkin, shall pay to the latter \$20,915.62 as the balance due him as compensation, which payment shall be made out of the \$376,479.00 to be deposited with the Registry of the Court by the plaintiff Sankin; such payment shall not extinguish such rights as defendant Garfield may have for contribution by defendants James T. Benn, 5410 Connecticut Avenue Corporation, Joseph Pardo, Dinty Whiting, Samuel J. Betoff, S. R. Winn and Aileen A. Link, Executrix of the estate of Harry W. Link, deceased;

(21) After paying to William J. Durkin the \$20,915.62 as provided herein and, if necessary under the terms of this judgment, after paying The Riggs National Bank \$3500.00, the Clerk of the Court shall pay to defendant Joseph A. Garfield the balance remaining of the \$376,479.00 to be paid into the Registry of the Court by plaintiff Julius Sankin;

~~(22)~~ Plaintiff Julius Sankin is awarded \$1.00 nominal damages with costs against defendant James T. Benn;

(23) Plaintiff Julius Sankin is awarded \$1.00 nominal damages with costs against defendant 5410 Connecticut Avenue Corporation;

(24) Plaintiff Julius Sankin is awarded \$30,000.00 punitive damages with costs against defendants Joseph A. Garfield, James T. Benn and 5410 Connecticut Avenue Corporation;

(25) For the reason stated in the Court's findings of fact and conclusions of law as set forth in the opinion filed herein, defendants Joseph A. Garfield, James T. Benn, 5410 Connecticut Avenue Corporation, Joseph Pardo, Dinty Whiting, Samuel J. Betoff, S. R. Winn, Aileen A. Link, Executrix of the estate of Harry W. Link, deceased, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them, are permanently restrained and enjoined from selling, transferring, pledging, disposing of, registering on the records of defendants Garfield and Sankin, Inc. and Julius Sankin, Inc., or affecting in any way the 66-2/3 shares of capital stock in Garfield and Sankin, Inc. and the 66-2/3 shares of capital stock in Julius Sankin, Inc. to which plaintiff Julius Sankin acquired title through purchase on May 26, 1959 from defendant Joseph A. Garfield, and they are further permanently restrained and enjoined from in any way interferring with or from making any claim to any interest in Garfield and Sankin, Inc. and Julius Sankin, Inc.

William B. Jones

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SANKIN
v.
5410 CONNECTICUT AVENUE
CORPORATION et al.

BENN
v.
GARFIELD
Civ. A. Nos. 1493-59, 4002-60.

United States District Court
District of Columbia.
Jan. 18, 1968.

Action by minority stockholder for damages and other relief by reason of majority stockholder's and others' fraudulent scheme whereby he was induced to pay inflated price for majority stockholder's stock. The District Court, William B. Jones, J., held that evidence established that negotiations entered into by majority stockholder with purported purchaser of his stock interest were a fraudulent scheme designed to circumvent stock restriction granting other stockholder first option to purchase, and that where majority and minority stockholders had agreed that they would have equal voting power and that minority stockholder would have first option to acquire majority stockholder's interest at price offered by bona fide purchaser and after minority stockholder exercised such option he discovered fraudulent scheme entered into by majority stockholder and third party to make ostensible sale at inflated price, rescission by minority stockholder was inadequate remedy in view of purchaser's refusal to recognize minority stockholder's right to equal voting power. The court further held that party to fraudulent scheme who was in turn defrauded by other participants was not entitled to relief against such participants.

Judgment for plaintiff.

1. Fraud \S 58(3)

Where only evidence as to fraudulent intent of parties was testimony of such

parties and one party admitted fraudulent intent and one denied fraudulent intent, court must pass on credibility of parties in determining whether or not fraud was perpetrated.

2. Fraud \S 58(1)

Evidence did not establish that party who negotiated for purchase of majority stockholder's interest which was subject to restrictive sale agreement was good faith purchaser for value.

3. Witnesses \S 331½

Tax Court opinion filed in tax litigation involving party to fraud action was not admissible on issue of credibility of such party.

4. Fraud \S 3

Essential elements of "fraud" are: (1) false representation (2) in reference to material fact (3) made with knowledge of its falsity (4) and with intent to deceive (5) with action taken in reliance upon representation.

See publication Words and Phrases
for other judicial constructions and
definitions.

5. Fraud \S 58(1)

Evidence established that negotiations entered into by majority stockholder with purported purchaser of his stock interest were a fraudulent scheme designed to circumvent stock restriction granting other stockholder first option to purchase.

6. Corporations \S 187

Majority stockholder who entered into negotiations with others to violate stock restriction whereby minority stockholder had first option to purchase his stock violated his fiduciary duty to deal fairly and honestly with his fellow stockholder.

7. Corporations \S 116, 187

Minority stockholder who had first option to purchase majority stockholder's stock at price offered by bona fide purchaser and who was fraudulently induced to pay inflated price for stock was liable for full purchase price but was entitled to recover as damages the difference be-

Cite as 281 F.Supp. 524 (1968)

tween that amount and reasonable value of stock.

8. Fraud \S 31

Minority stockholder who had first option to purchase majority stockholder's stock at price offered by bona fide purchaser and who discovered fraudulent scheme after he had exercised such option and had deposited notes in payment of purchase price and made down payment was not required to rescind such contract but could maintain action for damages.

9. Fraud \S 31

Where majority and minority stockholders had agreed that they would have equal voting power and that minority stockholder would have first option to acquire majority stockholder's interest at price offered by bona fide purchaser and after minority stockholder exercised such option he discovered fraudulent scheme entered into by majority stockholder and third party to make ostensible sale at inflated price, rescission by minority stockholder was inadequate remedy in view of purchaser's refusal to recognize minority stockholder's right to equal voting power.

10. Fraud \S 36

Agreement by majority stockholder to indemnify minority stockholder from any claims asserted against him by ostensible purchaser of majority stockholder's stock did not relieve majority stockholder from liability for damages by reason of minority stockholder's payment of inflated purchase price in purchasing majority stockholder's stock pursuant to agreement which gave minority stockholder first option to purchase stock at price offered by bona fide purchaser.

11. Release \S 17(1)

Where minority stockholder executed release to majority stockholder at time minority stockholder purchased majority stockholder's stock and at time of executing release minority stockholder was unaware of fraudulent scheme which had inflated price he paid for stock, release did not waive minority stockholder's

claim for difference between purchase price paid for stock and stock's reasonable value.

12. Corporations \S 111½

Provision which was part of Business Corporation Act of 1901 and required restrictions to be stated on certificate had no application to corporation organized for profit in 1958. D.C.C.E. §§ 29-201 et seq., 29-239, 29-901 et seq., 29-903, 29-904.

13. Corporations \S 199

Agreement whereby majority stockholder and minority stockholder agreed that their voting power should be equal but which was not endorsed upon stock certificates was not invalid. D.C.Code 1961, § 28-2915; D.C.C.E. §§ 29-908g, 29-911.

14. Corporations \S 199

Parties to fraudulent scheme to induce minority stockholder to pay inflated price for majority stockholder's stock and who knew of agreement between majority stockholder and minority stockholder for equal voting power in corporate affairs were not entitled to claim that voting agreement was invalid because of stock certificates' failure to contain such restriction. D.C.Code 1961, § 28-2915; D.C.C.E. § 29-908g, 29-911.

15. Fraud \S 36

Statutory provision that stock certificates must contain statement as to restrictions thereon was designed for protection of innocent purchasers of stock and could not be used as defense to suit by minority stockholder against those who were parties to fraudulent scheme whereby minority stockholder paid inflated price for majority stockholder's stock. D.C.Code 1961, § 28-2915; D.C.C.E. §§ 29-908g, 29-911.

16. Corporations \S 113

Ostensible transfer of majority stockholder's stock to third party which was part of fraudulent scheme whereby minority stockholder in exercising his first refusal option paid inflated price for majority stockholder's stock would not be held valid merely because certificates failed to have endorsed thereon

restriction as to their sale and voting power. D.C.Code 1961, § 28-2915; D.C. C.E. §§ 29-908g, 29-911.

17. Corporations ¶116, 199

Agreements between majority stockholder and minority stockholder whereby minority stockholder acquired option to purchase majority stockholder's stock at price offered by bona fide purchaser and whereby parties agreed to exercise equal voting power in corporate affairs were not indefinite.

18. Evidence ¶397(2), 417(9)

Where evidence established that written instruments did not contain entire agreement between parties, parol evidence which was not inconsistent with or variation of written agreements was admissible.

19. Sales ¶24

Contract which provides that one who has right of first purchase shall pay price set by a bona fide offer is sufficiently definite for enforcement.

20. Corporations ¶116

Agreement whereby minority stockholder acquired option to purchase majority stockholder's stock at price offered by bona fide purchaser was not rendered indefinite by provision that if majority stockholder desired to sell and had received no bona fide offer from third party, minority stockholder in exercising his purchase right would pay reasonable value of stock at time of purchase.

21. Federal Civil Procedure ¶335

Where court found that minority stockholder had been defrauded into paying inflated price for majority stockholder's stock, complaint in intervention which was filed by alleged owners of corporate stock of dummy corporation which was formed to acquire majority stockholder's stock as part of fraudulent scheme would be dismissed.

22. Conspiracy ¶18

Evidence in action by minority stockholder to recover damages by reason of fraudulent scheme whereby he paid inflated price for majority stockholder's

stock did not establish any conspiracy between majority stockholder and minority stockholder to defraud dummy corporation which was formed to acquire majority stockholder's stock as part of fraudulent scheme between majority stockholder and others.

23. Equity ¶65(1)

Parties who joined original party to fraudulent scheme had unclean hands and were not entitled to relief.

24. Equity ¶65(2)

Evidence established that stockholders of dummy corporation which was formed to acquire majority stockholder's interest in another corporation as part of scheme to defraud minority stockholder had joined in fraudulent scheme and doctrine of unclean hands precluded their obtaining relief.

25. Corporations ¶113

Where minority stockholder had right to acquire majority stockholder's stock by payment of purchase price offered by bona fide purchaser and majority stockholder ostensibly transferred stock to dummy corporation and minority stockholder exercised option, dummy corporation was not a stockholder entitled to accounting of corporate affairs.

26. Assignments ¶54

Where there was no consideration for transfer of claims against corporation to another corporation, such latter corporation was not a creditor entitled to accounting as to affairs of former corporation.

27. Equity ¶65(1)

Court would not order accounting of corporate affairs at request of party which was participant in perpetrating fraud on minority stockholder of corporation.

28. Equity ¶65(1)

Court may deny relief to party who had unclean hands even though other parties had not raised such issue.

29. Fraud ¶29

Party who participated with others in fraudulent scheme but who was in

turn defrauded was not entitled to relief against his coparticipants.

30. Corporations ¶66

Where payment of subscription for all corporate stock was made to the promoter but the corporate minute book showed no action by board of directors with respect to subscription, original incorporators could amend articles of incorporation to increase capital stock and amendment was not governed by provision for amendment of articles of incorporation by board of directors after acceptance of subscription. D.C.C.E. §§ 29-921g, 29-921h.

31. Money Received ¶12

Party who participated in fraudulent scheme was not entitled to recover money which another party who also participated in scheme obtained.

32. Fraud ¶29

Intervenors who did not participate in original fraudulent scheme but who were not innocent purchasers from party who did participate were not entitled to recover damages from such participant.

33. Fraud ¶58(1)

Credible evidence established that parties who participated in fraudulent scheme had not stolen money from other participant.

34. Fraud ¶58(1)

In action by minority stockholder for damages arising out of his payment of inflated price for majority stockholder's stock in corporation's operating apartment house project, evidence sustained special master's refusal to use reproduction cost method for computing value of apartment house project.

35. Federal Civil Procedure ¶1902

Only if special master's report was clearly erroneous should it be set aside. Fed.Rules Civ.Proc. rule 53(e), 28 U.S.C.A.

36. Fraud ¶58(1)

Evidence sustained special master's capitalizing apartment house income at 7.21% to determine damages sustained by minority stockholder of corporation's

operating apartment project in purchasing majority stockholder's stock at inflated price as result of fraudulent scheme by majority stockholder.

37. Fraud ¶59(1)

Special master in action by minority stockholder against majority stockholder for damages by reason of fraudulent scheme whereby minority stockholder was induced to pay inflated price for majority stockholder's stock did not err in refusing to discount value of stock by reason of voting and transfer restriction.

38. Fraud ¶59(1)

In action by minority stockholder against majority stockholder for damages by reason of fraudulent scheme whereby minority stockholder was induced to pay inflated price for majority stockholder's stock, finding by special master that value of corporation's stock must be reduced by promissory note from corporation to majority stockholder was proper.

39. Federal Civil Procedure ¶1905

Special master's report which in conformity with order of reference awarded damages to party who participated in fraudulent scheme but was himself defrauded would be set aside where court subsequent to order of reference changed its opinion and determined that such party was not entitled to relief.

40. Fraud ¶59(4)

Minority stockholder who was awarded damages against majority stockholder by reason of fraudulent scheme whereby minority stockholder was induced to pay inflated price for majority stockholder's stock would also be awarded damages of \$1 against each of parties who participated with majority stockholder in carrying out fraudulent scheme.

41. Indemnity ¶9(2)

Parties to escrow agreement with bank whereby bank held stock which was involved in fraudulent scheme and who agreed to indemnify bank against all expenses to which it might be put in consulting with counsel of its own choice

in connection with escrow agreements were liable to bank for attorney's fees incurred in conjunction with suit brought by minority stockholder who was victim of fraudulent scheme against parties to escrow agreement and bank.

42. Fraud Ⓒ61

Malice of parties who perpetrated fraudulent scheme against minority stockholder which resulted in minority stockholder paying inflated price for majority stockholder's stock warranted award of punitive damages.

43. Damages Ⓒ94

In proper case attorney's fees may be element of punitive damages.

44. Compromise and Settlement Ⓒ4

Where victim of fraudulent scheme had settled claim for attorney's fees with one of the perpetrators of scheme, he could not recover attorney's fees as element of punitive damages against other perpetrators.

45. Compromise and Settlement Ⓒ16(1)

Fact that victim of fraudulent scheme had settled claim for attorney's fees with one of the perpetrators of scheme did not bar victim from recovering punitive damages against perpetrators of scheme.

46. Corporations Ⓒ498

Acts of president and only stockholder of corporation were acts of corporation so that corporation as well as president were liable for punitive damages sustained by victim of fraudulent scheme in which corporation and president participated.

47. Fraud Ⓒ62

Punitive damages in the sum of \$30,000 would be awarded to minority stockholder who was victim of fraudulent scheme whereby he paid inflated price for majority stockholder's stock.

48. Federal Civil Procedure Ⓒ2742

Motion for costs and fees which referred to costs already incurred and to

costs which would be incurred would be denied without prejudice on ground it was premature. Fed.Rules Civ.Proc. rule 54(d), 28 U.S.C.A.

49. Corporations Ⓒ121(1)

Minority stockholder who was victim of fraudulent scheme whereby he paid inflated price for majority stockholder's stock was entitled to injunction against perpetrators of scheme enjoining them from interfering with his ownership of stock in corporation.

Edward L. Genn, Washington, D. C., for plaintiff Sankin.

Vail W. Pischke, Falls Church, Va., for defendant 5410 Connecticut Avenue Corporation and intervenor-defendant Pardo.

William H. Deck, Washington, D. C., for defendant James T. Benn.

Benjamin W. Dulany, Washington, D. C., for defendants Joseph A. Garfield and Janet Garfield.

John A. Beck, Washington, D. C., for intervenor-defendants Whiting, Betoff, Winn and Aileen A. Link, Executrix of the Estate of Harry W. Link.

Joseph Pardo, Miami, Fla., pro se.

OPINION

WILLIAM B. JONES, District Judge.

This multiclaim action resulted from certain fraudulent dealings with respect to an apartment house property situated in the District of Columbia. At issue are the claims asserted by plaintiff Sankin in his complaint against all defendants in Civil Action No. 1493-59; claims asserted in a complaint in intervention; and claims asserted in two counterclaims, four cross-claims and plaintiff Benn's complaint in Civil Action No. 4002-60.¹

1. Civil Action No. 4002-60 was consolidated with Civil Action No. 1493-59 since, except for the party defendant (Janet Garfield), it involved common

questions pending before the Court in James Benn's cross-claim against Joseph Garfield in Civil Action No. 1493-59.

From the evidence adduced at the trial of these actions I find the following facts:

Plaintiff Julius Sankin (Sankin) and defendant Joseph Garfield (Garfield) are related through marriage; Herman Mankes (not a party) being Garfield's uncle and Sankin's father-in-law. Prior to 1956, Mankes, Sankin and Garfield were interested in an apartment project in the District of Columbia known as the Livingston Apartments. That enterprise being successful, Sankin and Garfield entered into a partnership in 1956 for the purpose of purchasing a suitable site in the District of Columbia and constructing thereon another apartment building. That partnership was known as Garfield and Sankin. Sankin ascertained that property situated at 5410 Connecticut Avenue, N. W. could be purchased and in April 1956 that property was acquired in the name of Sankin and Garfield individually. The greater part of the funds necessary to effectuate the purchase was advanced by Garfield.

In August 1957 Garfield and Sankin entered into a written agreement for the purpose of defining their respective partnership rights and obligations in the property they proposed to develop. That agreement provided that while Garfield was to have a $\frac{2}{3}$ interest with respect to the profits and losses and Sankin a $\frac{1}{3}$ interest, the latter was to have an equal voice with Garfield in all decisions affecting the undertaking and property. Garfield was to advance such funds as might be required in excess of the mortgage financing for the construction of the proposed building. It was estimated that those advances would approximate \$150,000.00. Garfield was to be paid 6% per annum on the money advanced with a minimum of \$17,500.00. Sankin was obligated to plan the building, apply for a F.H.A. commitment, attempt to secure satisfactory mortgage money and to build the apartment building. For his contribution to the undertaking Sankin's services were to be valued at the rate of \$300.00 per week from the date the land was acquired in April 1956 until the

building was completed and, if the total of that sum together with the total of fees to be paid to building consultants did not exceed \$45,000.00, Sankin was to receive an additional equity of \$2,500.00.

In the latter part of 1957 an F.H.A. commitment was obtained but Sankin and Garfield concluded it was not feasible to construct the apartment building due to the unfavorable financing terms then available. The parties thereafter agreed to sell the property, together with an assignment of the F.H.A. commitment, building permits, and architectural and engineering plans. On that sale they received a \$50,000.00 deposit, which in this case has been referred to as the "Woodner deposit." The purchaser thereafter breached the contract and Garfield and Sankin individually declared the deposit forfeited. The purchaser brought an action to recover the deposit but without success.

In the spring of 1958 Sankin and Garfield decided to proceed with the construction of the apartment building. For that purpose in April 1958 two corporations were incorporated under the laws of the District of Columbia. Garfield and Sankin, Inc. was the corporation created for the purpose of owning and operating the apartment property. Julius Sankin, Inc. was incorporated for the purpose of constructing the building. In the case of each corporation 100 shares of stock were issued, of which Garfield owned $66\frac{2}{3}$ shares and Sankin $33\frac{1}{3}$ shares. On May 1, 1958 Garfield and Sankin entered into a written stockholders' agreement with respect to each corporation. By the terms of those agreements Garfield and Sankin had an equal voice in the affairs of each corporation notwithstanding Garfield's ownership of $66\frac{2}{3}$ shares compared to Sankin's $33\frac{1}{3}$ shares. Moreover, Garfield and Sankin each agreed that he, his heirs and assigns would not dispose of any of his shares without first offering the same to the other. Although not incorporated in their written May 1, 1958 agreements, Garfield and Sankin contemporaneously orally agreed that, in the

event either party wished to dispose of his stock, the other party in exercising his right of first purchase was to pay the seller either the reasonable value of the stock at the time of purchase or an amount equal to that offered the seller by a bona fide purchaser for value.

The stock certificates issued by each corporation to Sankin and Garfield set forth no restrictions as to voting rights nor notice of the right of first purchase by a stockholder. Counsel for the corporations advised Garfield and Sankin of the desirability to include such information on the stock certificates. However, Garfield requested that no such legend be placed on the certificates as he did not want his wife to be informed of the facts. Sankin consented.

Following the creation of the two corporations F.H.A. financing was obtained and the construction of the apartment building to be known as the Garfield Apartments was begun. Sankin was in charge of the work while Garfield, whose home was in Florida, intermittently came to Washington in connection with the project. Commencing with May 1, 1958, Sankin, with the consent of Garfield, began to draw the \$300.00 a week compensation agreed to in their August 1957 agreement. Under that agreement \$32,000.00 had accrued to Sankin from April 1956 (purchase of property) to May 1, 1958. Also there was \$7,500.00 on the books of Garfield and Sankin, Inc. which Sankin had advanced at the time of the purchase of the property—the amount remaining after a \$5,000.00 withdrawal by Sankin from the \$12,500.00 originally advanced by him.

Prior to May 1, 1958, Garfield had advanced to the Garfield-Sankin partnership \$164,500.00 for the purchase of the land on which to construct the building and to defray costs of development. On May 29, 1958 Garfield advanced \$25,000.00 to Garfield and Sankin, Inc. for the apartment building purposes.

By late February or early March 1959 Garfield had become dissatisfied with his relations with Sankin. It was then for

the first time that Garfield disclosed to his wife Janet that, while he owned 66⅔ percent of the shares of Garfield and Sankin, Inc. and of Julius Sankin, Inc., he had agreed that Sankin should have an equal voice in the affairs of the corporations. The Garfields determined that Sankin's voting power should be limited to his one-third interest in each corporation, but they did not make known their intention to Sankin. Instead, Janet suggested to her husband that he confer with defendant James Benn in Miami, Florida. She described Benn as a person professing to understand legal technicalities and as an international business man. Garfield knew Benn having had prior unpleasant and unprofitable business dealings with him. But not known to Garfield was the fact that his wife Janet and Benn were at that very time involved in an affair and that they intended to divorce their respective spouses and marry once Benn had settled his income tax difficulties with the United States Government. Moreover, Garfield did not know that Benn had on several occasions asked Janet to obtain for him an interest in the Garfield apartment project.

On March 14, 1959 the Garfields met in Miami with Benn at the office of intervenor-defendant Joseph Pardo, Benn's attorney. During a two hour conference the Garfields explained to Benn the problem of the voting rights and showed him the May 1, 1958 agreements of Sankin and Garfield with respect to their stock interests in both Garfield and Sankin, Inc. and Julius Sankin, Inc. The Garfields also showed Benn all the other documents relating to the apartment project except Garfield's cancelled checks evidencing his advances to the corporations. Benn advised Garfield that he would investigate the situation and devise a plan for restoring to Garfield his full voting rights.

On April 4, 1959 Benn again met with the Garfields and told them that he had investigated Sankin and that Garfield's suspicions were well founded—that Sankin was a fraud and was robbing Gar-

field. He further stated that he, Benn, had devised a legal method of insuring Garfield his full voting rights. Benn further stated that he was advising and assisting Garfield to make up for the loss sustained by Garfield in their prior business transactions and that he would accept no pay for his services except possibly \$500.00 with which he would buy a Government bond for the Garfields' daughter, Linda.

The plan conceived and urged upon the Garfields by Benn provided for the sale of Garfield's stock in Garfield and Sankin, Inc. to a corporation which Benn stated would be wholly owned by Garfield. This sale, Benn advised the Garfields, would permit the corporation as a bona fide purchaser to hold free from all of the restrictions of the stockholders' agreement Garfield's 66 $\frac{2}{3}$ shares of stock in Garfield and Sankin, Inc. So that Garfield would not appear as the owner, the stock of the corporation to be formed was to be issued to Benn but immediately endorsed and delivered by him to Garfield. The sales price of Garfield's stock to be sold to the corporation would be set at a price too high for Sankin to meet under his right of first purchase provided in the Garfield and Sankin, Inc. stockholders' agreement. When Garfield set the value of his 66 $\frac{2}{3}$ shares of Garfield and Sankin, Inc. stock as between \$375,000.00 and \$400,000.00, Benn stated that the sales price of the stock to the to be formed corporation would be \$600,000.00, this being a price which Benn believed would be too high for Sankin to meet.

On April 5, 1959, Benn again met with the Garfields and proceeded to draw up in longhand a draft of a stock purchase agreement frequently consulting and showing the Garfields sections of the negotiable instruments law and the District of Columbia corporation law.

On April 6, 1959 Benn met the Garfields at the office of a public stenographer on the mezzanine floor of the Columbus Hotel in Miami, Florida, and proceeded to dictate directly to a typist from

the longhand draft the stock purchase agreement. That method, Benn declared, would avoid any record of shorthand notes. When the stock purchase agreement had been completed, he urged and obtained Garfield's execution thereof. Benn executed the stock purchase agreement for a corporation to be formed. The stock purchase agreement, while entered into on April 6, was dated March 14, 1959. It provided, among other things, for the sale by Garfield of his 66 $\frac{2}{3}$ shares of Garfield and Sankin, Inc. stock to the to be formed corporation for \$600,000.00 represented by two nonnegotiable, non-interest bearing notes of such corporation, one a demand note of \$60,000.00 and one a note of \$540,000.00 due December 1, 1959.

Benn and the Garfields next met on April 7, 1959, in the District of Columbia at the office of Benn's Washington attorney. There an escrow agreement was prepared naming The Riggs National Bank of Washington, D. C. as escrow agent. It was executed by Garfield and 5410 Connecticut Avenue Corporation (5410), the to be formed corporation referred to in the stock purchase agreement. Benn signed on behalf of 5410 as "President Pro-tem."

Garfield and Benn on April 8, 1959 delivered to The Riggs National Bank the escrow agreement, the two April 8, 1959 nonnegotiable, non-interest bearing notes of 5410 executed by Benn as president pro-tem, and Garfield's stock power to 66 $\frac{2}{3}$ shares of Garfield and Sankin, Inc. stock. Subsequently Garfield delivered the actual stock certificate.

5410 was formed on April 10, 1959 as a District of Columbia corporation with authorization to issue 100 shares of capital stock.

Benn ascertained for the first time on April 19, 1959 that Garfield was co-signing checks on the bank account of Julius Sankin, Inc. and that there was approximately \$80,000.00 in this bank account. Despite the fact that Garfield told Benn that Julius Sankin, Inc. was the construction corporation and had no

permanent value, Benn advised that in furtherance of the plan to defeat Sankin of his 50% voting rights, Garfield should sell his 66 $\frac{2}{3}$ shares of stock in Julius Sankin, Inc. to 5410 at an inflated price of \$200,000.00. That price Benn stated would be higher than Sankin could meet.

On April 20, 1959, a stock purchase agreement providing for the sale of 66 $\frac{2}{3}$ shares of Julius Sankin, Inc. stock from Garfield to 5410 and an escrow agreement between The Riggs National Bank, Garfield and Benn as president pro tem of 5410 were drafted. Also drafted on that date were Garfield's stock power to 66 $\frac{2}{3}$ shares of Julius Sankin, Inc. stock and a non-negotiable, non-interest bearing demand note of 5410 in the amount of \$200,000.00 payable to Garfield. At Benn's insistence, Benn and Garfield during the evening of April 20, removed from the corporate office of Garfield and Sankin, Inc. and Julius Sankin, Inc. blank checks of those corporations. Those checks had been signed by Garfield several days before in order to make it possible for Sankin to pay construction bills as they became due.

Also on April 20, 1959 at the office of Benn's Washington attorney, Benn asked Garfield for \$1,000.00 in cash stating that the corporation (5410) had to be in business "and as long as you own it you might as well give me the money for the stock now, because we have to start a bank account." Garfield made out a check payable to Benn for \$1,000.00 but Benn tore it up and demanded one payable to "cash" so that Garfield's name would not appear to be in any way connected with 5410. Garfield thereupon made out his check to cash and endorsed it at Benn's insistence in order to make it appear as if Garfield had actually received cash in exchange for the check. Garfield in fact never received the cash.

The following day, April 21, 1959, Benn delivered the escrow agreement, Garfield's stock power and the demand note of 5410 in the amount of \$200,000.00 to The Riggs National Bank trust department, all of which pertained to Gar-

field's 66 $\frac{2}{3}$ shares of Julius Sankin, Inc. stock. Garfield subsequently delivered his stock certificate for 66 $\frac{2}{3}$ shares of Julius Sankin, Inc. to The Riggs National Bank. Also, on April 21, 1959, Benn opened a bank account for 5410 at The Riggs National Bank with a cash deposit of \$1,000.00.

And on April 21 Benn and the Garfields went to the apartment project and met with Sankin. Pursuant to Benn's instructions, Joseph Garfield informed Sankin that he had sold to Benn all of his stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. and that Sankin would have to do business thereafter with Benn. Sankin protested that he had a right of first purchase of Garfield's stock. However, Garfield made little or no response. Throughout this entire period Benn continually instructed Garfield to keep quiet and refrain from talking to anybody and to let him handle Sankin. Benn showed Sankin a copy of the negotiable instrument law and stated that he, Benn, was an innocent purchaser for value and that, therefore, he would refuse to recognize Sankin's claim to a 50% voting right. After leaving Sankin, Benn further reassured Garfield that he was "lucky" to get away from Sankin, whom Benn described as a thief, and that it was just a matter of time until he, Garfield, would have his full voting rights restored to him.

Special meetings of the boards of directors of Garfield and Sankin, Inc. and Julius Sankin, Inc. were held on April 24, 1959. Present were Sankin and Arthur Chaite who was not only a member of both boards, but was assistant secretary and counsel of both corporations. Also attending were Benn and his attorney, B. H. Saunders. At these meetings Garfield's resignation as a member of each board and as an officer of each corporation was presented. Benn was then elected to each board and as president of Garfield and Sankin, Inc. and secretary-treasurer of Julius Sankin, Inc. Resolutions were adopted authorizing Benn, or in his stead, Saunders, to countersign corporate checks with Sankin.

Benn, falsely claiming that he had at that time an irrevocable assignment from Garfield of all the funds the latter had advanced for the apartment project, demanded that from the corporate funds \$24,000.00 be distributed to 5410. He threatened that if such distribution was not made he would take action to have Garfield and Sankin, Inc. and Julius Sankin, Inc. placed in receivership. Before acceding to such demands and threats, Sankin required Benn to execute an indemnity agreement and he also demanded payment from the corporate accounts of his accrued salary. Benn agreed to Sankin being paid \$20,000.00 providing that \$8,000.00 of that amount be entered on the corporate books as a loan to Sankin. Thereafter \$44,000.00 of the corporate funds were withdrawn and Benn deposited \$24,000.00 in 5410 bank account.

The construction of the apartment building continued with the costs being met as they became due. But Sankin, being dissatisfied with the relationship he had with Benn, offered to purchase from Garfield 16 $\frac{2}{3}$ shares of the stock of each corporation in order that he might have 50% of the stock. Garfield refused to sell less than 66 $\frac{2}{3}$ shares in each corporation and stated that sale would have to be on the same terms on which he had purportedly contracted to sell to Benn. Garfield and Benn both agreed that Sankin could have until May 30 to complete the purchase.

During this same period of time Garfield was demanding of Benn some written evidence of the former's entire ownership of 5410 corporation. On April 27 Benn gave Garfield a "holographic" stock power and assignment for 100 shares of 5410. Benn executed that instrument without restriction. And on April 29 Benn executed on the stock certificate an assignment to Garfield of the 100 shares of common stock registered in Benn's name. However, that assignment carried an endorsement reciting that the shares of 5410 stock represented by the certificate were the same shares of stock represented by the stock

power and assignment in favor of Garfield, "which stock power Joseph A. Garfield shall hold as further collateral security for payment in connection with the Garfield Apartment Building, Washington, D. C."

Benn in so assigning the stock deliberately deceived Garfield because at that time, while assuring Garfield that the latter was the entire and true owner of 5410, he did not disclose that on the previous day, April 28, the charter of 5410 had been amended to increase the authorized common stock from 100 to 250 shares. That amendment to the charter followed an April 22 certification to the Corporation Trust Company by the counsel and secretary of 5410 that no stock subscriptions had been received. As already noted Garfield on April 20 had paid \$1,000.00 for all of the authorized common stock.

During this same period Benn was seeking not only to take from Garfield the latter's stock ownership in Garfield and Sankin, Inc. and Julius Sankin, Inc. but also monies which Garfield claimed were owed to him by Garfield and Sankin, Inc. On April 26, 1959 Garfield at Benn's insistence gave Benn all of his cancelled checks evidencing his advances to the Garfield and Sankin partnership as well as to Garfield and Sankin, Inc., which checks Benn stated he would photostat and return.

On April 28, 1959, Benn told Garfield that the latter had to show more consideration to 5410 for its notes totaling \$800,000.00; that in order to do so, he had to assign over to 5410 the money owed to Garfield by Garfield and Sankin, Inc.; that if he did not Sankin would attack the "bona fides" of the whole scheme. Benn presented to Garfield and urged him to execute an irrevocable assignment to 5410 of his advances but Garfield at that time refused.

Also on April 28, 1965 Benn advised Garfield that a joint letter of authorization to The Riggs National Bank had to be prepared and executed in order to

prevent Sankin from attacking the "bona fides" of the sham transfer of Garfield's stock to 5410. Benn prepared and Garfield executed such a letter. That letter authorized Riggs Bank to deliver to counsel of Garfield and Sankin, Inc. and Julius Sankin, Inc. the stock certificates then held in escrow by the Bank which represented the stock issued by each corporation to Garfield; and the letter further authorized the Bank to receive and place in escrow stock certificates which would represent shares registered in the stock transfer books of the two corporations in the name of 5410. However, because Sankin objected, Garfield's stock certificates were not cancelled on the books of Garfield and Sankin, Inc. and Julius Sankin, Inc. nor were new certificates issued to 5410.

On May 4, 1959 Benn again told Garfield that he was certain Sankin was going to attack the purported sale of Garfield's stock to 5410 and that to prevent this Garfield had to "show consideration" by assigning to 5410 his money advances to the Garfield and Sankin partnership and Garfield and Sankin, Inc. And in order to give a further "bona fide" appearance to their fraud on Sankin, Benn stated that he would give Garfield a stock power for 2,000 shares of bearer stock of International Timber Company, a Panamanian corporation. For such stock power Garfield was to return to Benn the \$800,000.00 in notes executed by 5410 to Garfield. At first Garfield refused to follow Benn's advice stating that the transaction was getting too complicated and that he would not sign any more papers. Janet Garfield, in Benn's presence, told Garfield to pay Benn \$5,000.00 for his trouble, to get back all documents from Benn and terminate relations with Benn. But Benn was not to be so prevented in the achievement of his purpose. He again reassured the Garfields that they had nothing to worry about, that the papers he requested were necessary to insure the restoration of Garfield's full voting rights which in turn were necessary to protect Garfield from Sankin. He further assured Gar-

field that since he, Garfield, owned 5410 he had nothing to worry about.

After such assurance had been made by Benn and upon Benn's continued urging, Garfield executed the following documents all prepared by Benn:

- (a) An irrevocable assignment to 5410 of all of Garfield's advances to Garfield-Sankin partnership and Garfield and Sankin, Inc.
- (b) An exchange agreement substituting 2000 shares of bearer stock of International Timber Company for the \$800,000.00 in notes of 5410 to Garfield.
- (c) A joint letter to The Riggs National Bank authorizing the delivery of those notes marked "Paid and Cancelled" to Benn's attorney.
- (d) A paper writing purportedly acknowledging receipt by Garfield of 2000 shares of the bearer stock of the International Timber Company.

While Garfield executed the receipt he never received the stock certificate for 2000 shares of the bearer stock of International Timber Company. In fact this certificate was seen in Benn's briefcase by Mrs. Garfield on May 8, 1959. Benn gave Garfield a stock power for the 2000 shares of bearer stock. Garfield had never heard of the International Timber Company prior to May 4, 1959, and knew nothing about it.

International Timber Company was formed by Benn in July of 1958 with authorized capital of 2000 shares of no par bearer stock. The sole asset of International Timber Company was an option to purchase for \$10,000.00 on or before October 24, 1961, one-half of the stock of the Surinam American Timber Company, which purported to have a right to develop certain timber concessions in South America. Benn had previously sold all of the stock in Surinam American Timber Company to Orion Realty Company for \$20,000.00 reserving the option. International Timber Company never had a bank account and no stock of the corporation was ever issued until May 4, 1959.

It was on May 6, 1959 that Garfield learned for the first time (from his uncle, Herman Mankes) that Benn had on April 24 withdrawn \$24,000.00 from Garfield and Sankin, Inc. as a payment on account of Garfield's advances. Garfield told his wife, Janet, of that withdrawal and she communicated with Benn who was in Washington and asked him to come to Coral Gables, Florida. At that time she and Benn were still intending to be married, but before that event she wanted Benn to return to her husband all that Benn had taken from him, including the \$24,000.00 and Garfield's files and cancelled checks which had been given to Benn and which the latter had never returned although he had on several occasions promised Garfield he would do so.

Benn arrived at the Garfield's Coral Gables home on May 8 and he remained there until May 9. While there he denied receiving the \$24,000.00 from Garfield and Sankin, Inc. During this period of time there was much acrimonious discussion and among other things Garfield learned for the first time of the relationship between Benn and Janet Garfield. While Benn was at the Garfield home, Janet Garfield took his large briefcase to her brother's home. She noted, but did not take, a certificate for 2000 shares of bearer stock of International Timber Company. There were also in the briefcase two Manila sealed envelopes the corner of one which she tore and noted that it contained currency. On May 9 she returned to Benn the two sealed envelopes as well as the briefcase and all of its contents except the material which belonged to Garfield. Benn gave her a receipt for the money returned which he claimed amounted to \$120,000.00. On the same day and before the return to him of his property, Benn gave Garfield another certificate for 100 shares of 5410 stock.

Garfield on May 11, 1959 for the first time consulted his Miami attorney, Don Nicholson, and told him of the dealings he had been having with Benn. Nicholson immediately advised Garfield that he had wronged Sankin and that Sankin had

to be restored to his full voting rights under the May 1, 1958, stockholders' agreements. This was to be accomplished by a complete rescission of the Benn-5410-Garfield transactions leaving Garfield's stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. in Garfield's name and subject to the May 1, 1958, stockholders' agreements. As an alternative procedure Nicholson advised Garfield to gain full control of 5410 and then reverse all of the Benn-5410-Garfield transactions.

Following his conference with Nicholson, Garfield met Benn on May 11 and on May 12. On each of those occasions Benn gave Garfield one or more additional certificates for 100 shares of 5410 stock. And he gave one or more certificates for 100 shares to Janet Garfield. All of the certificates were restricted, purporting to be collateral for 5410's notes of \$800,000.00, although, as mentioned above, those notes on May 4 were purportedly exchanged by Garfield for 2000 shares of bearer stock of International Timber Company.

On May 13, 1959, after Benn had returned to Washington, D. C. he issued 250 shares of 5410 stock to himself with Saunders as secretary of the corporation signing the certificate. The 250 shares were issued pursuant to the April 28 amendment of 5410's charter as mentioned above. It was also on May 13 that Garfield attempted to reach Benn by telephone at Saunders' office and upon being told that Benn was not there Garfield talked to Saunders. Garfield told Saunders to instruct Benn not to do anything further with 5410. Notwithstanding such instruction Benn withdrew in cash \$17,500.00 from 5410's bank account.

Arthur Phelan, Garfield's Washington counsel, on May 14, delivered by hand a letter to Saunders as secretary of 5410 and at the same time tendered a stock certificate and a stock power, both of which had been previously executed by Benn and each of which assigned to Garfield 100 shares of 5410 stock. Phelan requested that the 100 shares be transferred on 5410's books to Garfield.

By telephone the same day Phelan advised Saunders that it was Garfield's position that Benn was "over-reaching." In response to a question by Phelan, Saunders stated that no stock in 5410 had been issued, despite the fact that as secretary of 5410 he had signed on the previous day Benn's certificates for 250 shares. And it was on May 14 that Saunders resigned as secretary of 5410 but he did not inform Phelan of that fact.

The following day, May 15, Saunders informed Phelan that Benn was willing to have 100 shares of 5410 transferred to Garfield's name. When asked if this was the entire capital stock of 5410, Saunders stated that he was not certain but would investigate and advise Phelan. Saunders subsequently telephoned Phelan and advised him that there were 250 shares of 5410 authorized and he renewed his offer to transfer 100 shares to Garfield. Phelan inquired as to what possible reason there would be for Garfield, who had put up all the money, ending up with only 40% of 5410 while Benn would continue to hold 60%. Saunders gave no explanation.

On May 16, 17, 18, 19 and 21, 1959, Benn was in Saunders' office. Between May 15 and May 21, Phelan called Saunders requesting a meeting of Benn and Garfield to be held on May 21. Saunders informed him that Benn was out of town. On May 21, 1959, Phelan asked Saunders to arrange a meeting of Benn and Garfield but Saunders again stated that Benn was out of town.

Late in the evening of May 21, Garfield in Miami and Benn in Washington talked by telephone. Garfield initiated the call and he demanded of Benn that the latter "return everything to its original state."

Saunders as Benn's counsel on May 22 called Phelan and inquired about a rescission agreement between Benn and Garfield. Phelan having no knowledge of any rescission discussion referred Saunders to Nicholson. Saunders then called Nicholson in Miami and advised him that Benn and Garfield had agreed to a re-

scission of all of the Benn-5410-Garfield transactions with Benn being paid his out-of-pocket expenses. Nicholson stated that he would prepare a draft of a rescission agreement and forward it to Saunders at the earliest possible date and that he would meet with Benn, Saunders and Garfield as soon as a meeting could be arranged. Nicholson added that he and Garfield would be available at any time on May 26, 27, 28, and 29. Nicholson thereupon prepared a draft of the rescission agreement.

During the May 22 telephone conversation between Nicholson and Saunders, intervenor-defendant Whiting, as counsel for 5410, was on an extension telephone and participated in the conversation. Nicholson stated in the course of the conversation that Benn was perpetrating an enormous fraud on Garfield and that he, Nicholson, did not trust Benn and he didn't think there was any semblance of good-faith in the Benn-5410-Garfield transaction.

When on May 25 Saunders received Nicholson's draft of the rescission agreement he discussed it with Whiting. Whiting thereupon called Nicholson who proposed an immediate execution of the rescission documents at a meeting of the parties. Whiting countered with a demand that Garfield first execute the rescission agreement or write a letter stating that all recitations in the rescission agreement were true. Nicholson told Whiting that he did not trust Benn; that he considered Benn a fraud artist; and that he would only deal with Benn at a meeting where all parties executed the rescission agreement contemporaneously.

During the period that Nicholson and Garfield were attempting to effect a complete rescission of the Benn-5410-Garfield transactions, Benn on May 15, 1959, met with Sankin. Benn again asserted that Garfield had sold his stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. and that if Sankin was to acquire that stock under his first purchase rights he would have to purchase it from Benn. At that time Benn told Sankin he knew that the \$800,000.00 he

had paid Garfield was greatly in excess of its true value but that he could afford to do so because he was using tax free money from out of the country. Benn offered the Garfield stock to Sankin for \$480,000.00. Sankin refused to purchase the stock from Benn and he added that even that sum was in excess of the true value of the stock. Benn then offered to purchase for \$250,000.00 Sankin's $\frac{1}{3}$ interest in Garfield and Sankin, Inc. and Julius Sankin, Inc. Sankin accepted the offer and Benn stated that his counsel Whiting with Sankin's counsel would prepare the necessary agreement to accomplish the purchase by Benn.

During the following several days Sankin called Whiting on more than one occasion and inquired as to the status of the purchase by Benn. Whiting each time advised Sankin that Benn was out of Washington and could not be reached, although in fact Benn was in Washington. Sankin concluded that Benn was not going to honor his offer to purchase Sankin's stock interests and, realizing that he had to exercise his right of first purchase from Garfield on or before May 30 he arranged to meet with the latter in Washington on May 26.

Sankin with his counsel met with Garfield and Nicholson on May 26 at which time he exercised his right of first purchase by entering into the necessary agreements and delivering his notes totaling \$800,000.00 to Garfield. The notes in amounts and terms were as Garfield demanded and conformed to the amounts and terms purportedly agreed to by Benn-5410. Thereafter, late in the same day Riggs National Bank, as escrow agent, was notified of Sankin's purchase of Garfield's $66\frac{2}{3}$ shares of stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. On May 27, Riggs National Bank refused to turn the stock over to Sankin because of an adverse claim made by 5410.

Sankin met again with Garfield on May 28 and learned for the first time of

the fraudulent transactions between Benn-5410-Garfield for the purpose of depriving Sankin of his equal voice in the affairs of Garfield and Sankin, Inc. and Julius Sankin, Inc. At that time Garfield related all of the facts to Sankin. On May 29 Sankin instituted Civil Action 1493-59.²

Although unknown to Sankin at the time, there was on the very day he exercised his rights of first purchase, a meeting being held in the Army and Navy Club in Washington, D. C. The meeting commenced at 10:30 A.M. on May 26 and there were present Benn and intervenor-defendants Link, Pardo, Whiting and Betoff. There and then Benn purported to sell to those four intervenor-defendants 200 shares of 5410 stock. After a discussion lasting about two hours, the price, terms and conditions were agreed upon and the balance of the day was spent with Benn preparing the stock purchase agreement and related papers.

The fifth intervenor-defendant, Winn, arrived in Washington on May 27, 1959 and on that date he purportedly purchased the remaining 50 shares of 5410.

Among the agreements signed by Benn and the five intervenor-defendants was one which gave the intervenor-defendants the right to resell the stock of 5410 to Benn at a substantial profit on December 1, 1959, and which also indemnified them from any loss resulting from their purported purchase. This agreement was subsequently destroyed by the intervenor-defendants after this action was filed.

Intervenor-defendant Link is now deceased.³ Prior to his death he was the head of the A. M. Kidder Company's stock brokerage office in Miami, Florida. He had been involved with Benn in other transactions and in October of 1958 he represented one Dr. Klawans, a Cuban national, who in turn represented the Orion Realty Company, a Cuban syndi-

2. Consolidated Civil Action 4002-60 was instituted by Benn against Janet Garfield on December 6, 1960.

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3. Link's executrix was substituted for him in Civil Action 1493-59.

... Surinam American Timber Company for \$20,000.00. The closing of that transaction took place in Link's office. The sales contract between Benn and Orion Realty Company reserved a three year option in Benn to repurchase one-half of the Surinam American Timber Company stock for the sum of \$10,000.00. That option was immediately assigned by Benn to International Timber Company, an unfunded corporation wholly owned by him. Link was an officer of the International Timber Company; he knew of the assignment of the option; and in all probability executed it. Link did not know at the time of the taking of his deposition, on March 23, 1960, whether Benn had ever exercised his option to repurchase one-half of the stock of the Surinam American Timber Company.

Intervenor-defendant Pardo, at Link's request, was present at the closing of the sale of the Surinam American Timber Company stock to Orion Realty Company. He acted as interpreter for Dr. Klawans and he knew about the assignment of the reserved option by Benn to International Timber Company. Pardo was an officer of the International Timber Company but he later resigned because of a possible conflict in interest.

In May of 1959, Link knew that Benn had no office or home address and he knew that Benn was under a \$443,000.00 Internal Revenue Service jeopardy assessment. Benn had also told Link about his difficulties with Garfield and the purported theft of Benn's briefcase and \$60,000.00. Link had prepared an affidavit for Benn with regard to the counting by Link of \$60,000.00 in \$100.00 bills at the latter's home.

A week or ten days prior to May 26, Benn called Link and told him that he had a "good deal" on which Link could make money. He requested Link to be prepared to come to Washington on short notice to consummate the deal. In this first conversation Benn gave no details with regard to what was involved and

... apartment ... of the ... received a second call from Benn on May 22 or May 23 and he was asked to come to Washington immediately. Again no details of the proposed deal were disclosed. Link came to Washington on the evening of May 25 and he went to the Army and Navy Club where he met Benn. If any business was discussed that night the discussion was very limited.

At the meeting held in Link's room at 10:30 A.M. on the morning of May 26, Benn offered to sell all of the stock of 5410 for the sum of \$550,000.00. Link made no investigation relative to the proposed stock purchase; he did not look at the 5410 minute book, nor did he even look at the apartment property until some time in 1960. Link did not talk to Sankin, did not see any of the records or financial statements of Garfield and Sankin, Inc. and made no investigation of any of the documents which were shown to him. Link knew that Sankin had a right to purchase the stock of Garfield and Sankin, Inc. and Julius Sankin, Inc. for \$800,000.00 such right to expire within a few days. Link executed the stock purchase agreement late in the afternoon of May 26 and gave Benn a check for \$30,000.00 and an unsecured note for \$80,000.00. For that he was to receive 50 shares of 5410's 250 shares. Link believed that his check would be held in escrow and he recalled the discussion relative to the repurchase of 5410 stock by Benn in December of 1959 at a higher price than the intervenors had paid for it. There was also discussion relative to placing the purchase money notes in escrow so as to keep them out of circulation.

Link told Benn not to cash his check as it would not clear but to hold it until he could send him another check. Link, after returning to Miami on the evening of May 26, sent to Benn in care of Saunders' office a check dated June 1, 1959. When Link left Washington he did not have an executed copy of the stock purchase agreement nor did he have any stock of

He had left a check for \$80,000.00 and thereafter sent a second check for \$30,000.00.

Intervenor-defendant Pardo is a Miami attorney who had known Benn since 1950 or 1951. Benn had referred to Pardo as his attorney and the latter had represented Benn's corporations and he had in fact been an officer of International Timber Company, which Benn purported to own. Benn frequently used Pardo's office and Pardo frequently notarized papers for him and acted as interpreter in Benn's various dealings with Spanish speaking people.

Pardo, at Benn's request, left Miami at about midnight on May 25, 1959 to fly to the District of Columbia. He met Garfield and the latter's counsel, Nicholson, at the Miami airport. Nicholson informed Pardo that Garfield and Benn had become involved in a dispute involving an apartment building in Washington, which was named Garfield Apartments and that Nicholson was on his way to Washington to conclude a rescission or cancellation of all of the transactions between Garfield and Benn. In response to Nicholson's question, Pardo stated that he was not aware of any Benn-Garfield transactions and that he, Pardo, was not going to Washington to meet with Benn but that he was on his way to transact other business elsewhere.

Pardo arrived in Washington, D. C. early on May 26 and he went to the meeting in Link's room at the Army and Navy Club where Benn led the discussion of the proposed purchase by the intervenor-defendants of Benn's stock in 5410. The purchase price was discussed first and then documents were shown to the intervenors. This discussion lasted for approximately two hours during which time Benn told the intervenor-defendants about the difficulties he was having with the Garfields over the purported theft of his briefcase and \$60,000.00. At lunch time the intervenor-defendants present agreed to purchase Benn's stock and the balance of the day was spent with Benn.

At this time Pardo saw the stockholders' agreements executed by Garfield and Sankin on May 1, 1958. Pardo, having seen the exchange agreement and the cancelled 5410 notes to Garfield was aware of the fact that Benn had purportedly exchanged with Garfield 2000 shares of International Timber Company bearer stock for \$800,000.00 in notes. Further Pardo was fully aware that International Timber Company had little or no value owning only an option to purchase one-half of the stock of Surinam American Timber Company at a price of \$10,000.00. Surinam American Timber Company in turn owned at most a timber concession. In March 1958 Benn had purchased for \$15,000.00 the entire capital stock of the purported concessionaire corporation and in October 1958 had sold the entire capital stock of that corporation for \$20,000.00 together with a three year option to repurchase one-half of that stock for \$10,000.00, which option was given to International Timber Company.

In the late evening of May 26, 1959, The Riggs National Bank notified 5410 that Sankin had exercised his right of first purchase with Garfield. Pardo then prepared in Saunders' office and sent in the name of 5410 a telegram to The Riggs National Bank which instructed the Bank not to release the stock of Garfield and Sankin, Inc. and Julius Sankin, Inc. to Sankin unless and until the Bank received \$800,000.00. This telegram was received by the Bank early in the morning of May 27. The Bank in turn delivered to 5410 at Saunders' office a formal written notification that Sankin had exercised his right of first purchase with Garfield. Thereafter at 10:05 A.M., The Riggs National Bank received a letter prepared in Saunders' office by Pardo which was signed by Benn as president of 5410. That letter was delivered by hand by Whiting and it confirmed the telegram sent the night before. Pardo had full knowledge of Sankin's exercise of his right of first purchase from Garfield not

later than the morning of May 27. Later that morning Pardo executed a stock purchase agreement with Benn and gave Benn his unsecured note for \$95,000.00 and his personal check for \$15,000.00 for which Pardo was to receive 50 shares of 5410 stock.

Intervenor-defendant Whiting's testimony at the trial was by deposition. He was unable to appear in person since he was incarcerated in the Federal House of Correction in Danbury, Connecticut, after having been found guilty by the United States District Court for the Southern District of New York of attempting to obtain by fraud \$20,000,000.00.

Whiting had purchased from Benn in February of 1959 one-half of the stock of Surinam American Timber Company (pursuant to the option to purchase held by International Timber Company) for \$10,000.00 in cash and \$40,000.00 in notes. This transaction was rescinded at Whiting's request several days thereafter.

On May 15, 1959 Whiting was in the District of Columbia acting as Benn's attorney. By a check dated May 13 Benn had withdrawn \$17,500.00 from 5410's bank account. It was in that account he had deposited on April 27 the \$24,000.00 which he had obtained by coercion from Garfield and Sankin, Inc. On May 18, 1959 Benn paid Whiting \$18,000.00 in \$100.00 bills for the express purpose of permitting Whiting to purchase 50 shares of 5410 stock from Benn. Whiting on May 26 paid Benn \$20,000.00 in \$100.00 bills as partial payment for the former's purported purchase of 50 shares of 5410.

Whiting was aware of the dispute between Garfield and Benn over the briefcase episode. He had been put on notice by Nicholson that Benn-5410 were perpetrating fraud on Garfield and that there was no semblance of good faith in the Benn-5410-Garfield transactions. Whiting was fully aware of the drafted rescission agreement between Benn-5410 and Garfield and the recitations contained therein.

On May 26, 1959 Whiting had full knowledge of the fact that Sankin had exercised his right of first purchase with Garfield. He participated in the preparation of the telegram to The Riggs National Bank sent late in the evening of May 26. He also helped prepare the confirming letter on May 27 which he hand-delivered to The Riggs National Bank.

Whiting, as counsel for Benn, negotiated with Sankin and Dobin, his counsel, for the sale of Sankin's stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. to Benn. During this same period Whiting was obstructing Nicholson and Garfield in their attempts to have a formal rescission agreement executed by Benn and Garfield.

Intervenor-defendant Betoﬀ is a diamond broker, part owner of the Million Dollar Pier at Atlantic City and half-owner of a diamond exchange corporation. He claimed familiarity with F.H.A. financing and property values.

Benn, whom Betoﬀ testified he knew only casually, first called him on May 24 or 25 and told him that he had a "good deal" from which Betoﬀ could make \$10,000.00 to \$15,000.00 per year. Betoﬀ came to Washington on the evening of May 25. On the morning of May 26 he went to the Garfield Apartments and walked around the building for a few minutes and at 10:30 went to the meeting in Link's room at the Army and Navy Club. He did not investigate Garfield and Sankin, Inc. or Julius Sankin, Inc. records, he did not read the 5410 minute book and he did not talk to Sankin. He was shown some papers but cannot identify which ones except the cancelled notes in the amount of \$800,000.00. He does not know whether he saw the originals or photostatic copies of said notes; in fact, he claims not to know the difference between an original and a photostatic copy. He saw the Goldwyn and Berlin Auditors' report with respect to Garfield and Sankin, Inc. He testified that he thought the Garfield advances to Garfield and Sankin, Inc. as shown on said report were an asset of

Garfield and Sankin, Inc. He also testified that he believed that 5410 held the title to the Garfield Apartments.

On May 27, after notice had been given that Sankin had exercised his right of first purchase, Betoff executed the stock purchase agreement with Benn. He gave Benn his unsecured note for \$85,000.00 to be paid out of corporate earnings; it was not to be negotiated by Benn. He also gave to Benn two checks, one for \$10,000.00 and one for \$15,000.00, the latter not to be cashed for several weeks. Betoff was to receive 50 shares of 5410's stock.

On the subject of Sankin's right of first purchase the testimony of Betoff is confused to say the least. He testified alternatively (a) that Sankin had a right to purchase within a few days for \$800,000.00 cash and that 5410 had a right to receive from Garfield and Sankin, Inc. \$182,000.00 representing Garfield's advances and (b) that the \$800,000.00 purchase price included the \$182,000.00 Garfield advances and that Sankin could purchase both the stock and the advances for two-thirds of \$800,000.00.

Betoff has been a financially successful man who could be expected to adequately investigate any proposed business venture. But he testified that he made no investigation concerning his investment of \$110,000.00 for a purported interest in 5410 although the means were readily available to him. His testimony is that "he wasn't going to look a gift horse in the mouth" and that he did not inquire of Benn as to the latter's reason for selling for \$550,000.00 to the five intervenor-defendants that for which Benn had purportedly paid \$800,000.00 a little over one month earlier.

On May 27, 1959, Stanley R. Winn arrived in Washington and purportedly purchased Benn's last remaining 50 shares of 5410 stock. Intervenor-defendant Winn is a financial consultant specializing in commercial banking, commercial financing and investment banking. His business requires him to investigate various business ventures and to advise his

clients as to the desirability of investing therein. He came to Washington on May 27 on short notice at Whiting's request. He thereupon met with Benn and Whiting who was acting as his (Winn's) attorney. After looking at the documentation for a short period of time, he executed the stock purchase agreement and gave Benn his unsecured note in the amount of \$90,000.00 and his personal check in the amount of \$20,000.00. After giving his check to Benn an agreement was reached whereby Winn could substitute \$20,000.00 in Government bonds for his check. This substitution was made on June 1, 1959.

Despite the fact that all of Winn's negotiations for the purchase of Benn's stock took place at Saunders' office, he claims never to have seen the telegram and confirming letter sent to The Riggs National Bank by 5410 nor the letter from The Riggs National Bank to 5410 all pertaining to Sankin's exercise of his right of first purchase. Of all of the documents which Winn claims to have seen he can only recall seeing photostats of 5410's cancelled notes to Garfield. He admits knowing that Sankin claimed a fifty percent voting right in Garfield and Sankin, Inc. and Julius Sankin, Inc.

With regard to Sankin's right of first purchase Winn testified that he knew that Sankin had such a right but thought it had been extended for several months. He stated that he made no investigation of such extension and saw no documents to support it. He testified that he thought Sankin could purchase for \$550,000.00 the 66⅔ shares of Garfield and Sankin, Inc. and Julius Sankin, Inc. as well as the Garfield money loans. He further testified that he understood from Benn or Whiting that Sankin was not going to exercise his right to purchase but he did not talk to Sankin or in any other way attempt to verify that information. Even on June 1 when he substituted Government bonds for his check he did not attempt to find out whether Sankin had exercised his right of first purchase.

In Miami on June 2, 1959, Benn cashed the down payment checks of Pardo, Link and Betoff all with the assistance of Pardo's endorsement. Betoff actually gave Benn cash for his down payment check and then deposited that check into his bank account.

As stated above Sankin instituted Civil Action 1493-59 on May 29, 1959, the day after he learned from Garfield of the fraudulent activities of the latter and Benn. The complaint named 5410, Benn, Garfield and five others as defendants. By the time the action came on for trial the five other defendants had been dismissed and by an amendment the five intervenor-defendants had been added as defendants. The complaint, as amended, alleged a conspiracy by all defendants to fraudulently deprive Sankin of his right to purchase Garfield's stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. and it requested the Court to adjudicate the binding effect of the Sankin-Garfield May 1, 1958 stockholders' agreements, to declare the purported transfer of Garfield's stock to 5410 as fraudulent and to award that stock to Sankin in accordance with the May 1, 1958 stockholders' agreements on such terms as would be fair and equitable. Sankin also requested the Court to require The Riggs National Bank to deposit the Garfield shares with the Court and to enjoin the defendants from selling, transferring, pledging, disposing of, registering on the corporation books, or taking any other action that would affect those shares. Thereafter, the shares were deposited with the Court and defendants were enjoined.⁴

Following the filing of the complaint, other pleadings were filed by the other parties to the action which included counterclaims, intervenors' claims and

cross claims. Extensive pre-trial discovery was undertaken resulting in among other things voluminous depositions. In October 1963 trial of the consolidated actions was begun with a mistrial being declared after eight trial days. Thereafter additional pleadings asserting additional claims were filed and additional pre-trial discovery was conducted with additional depositions being taken. On October 19, 1964 the second trial commenced and continued on the liability issues alone up to and including January 5, 1965.⁵ There are over 6,000 pages of transcript on the liability issues and almost 200 exhibits were received in evidence.

The different claims of the several parties will be treated separately and thereafter the issue of damages will be dealt with.

I Plaintiff's Complaint

The first question presented by Sankin's complaint as amended is whether a fraud was worked upon him for the purpose of depriving him of his right of first purchase of Garfield's stock holdings in Garfield and Sankin, Inc. and Julius Sankin, Inc. I find as a fact that Garfield, Benn and 5410 did conspire to fraudulently deprive Sankin of his stock purchase rights. I do not find that the five intervenor-defendants were members of that conspiracy.

The evidence is clear and convincing that at the suggestion of his wife, Garfield went to Benn with whom the wife was involved in a romantic affair. Garfield's sole purpose was to enlist Benn's aid in depriving Sankin of his equal voting rights with Garfield in Garfield and Sankin, Inc. Present at the first meeting on March 14, 1959, were Garfield, his wife, Janet, and Benn. At no time during that meeting of two hours was

4. Sankin's complaint, as amended, also seeks reasonable attorney's fees. At the 1962 pre-trial conference and again at the 1964 pre-trial conference Sankin asserted claims for compensatory and punitive damages. Those demands became a part of the pre-trial orders entered.

5. At the commencement of the second trial the Court ruled, as it did when the first trial commenced, that the liability questions would be separately tried and that thereafter the question of damages would be referred to a Special Master. Such a reference was made and will be hereafter more particularly referred to.

anyone else present. Garfield told Benn of his desire and he showed Benn the Sankin-Garfield May 1, 1958 stockholders' agreements. From those agreements as well as Garfield's disclosures, Benn learned that Sankin had an equal voice in the affairs of Garfield and Sankin, Inc. and Julius Sankin, Inc. and also a right of first purchase of Garfield's stock in the event the latter desired to sell. From that time on Benn took charge.

It was Benn who devised the scheme to defraud Sankin, a scheme which Garfield willingly accepted and in which he willingly participated. That scheme in essence was that a corporation (5410) would be formed and Garfield would sell to it his stock holdings in the Sankin-Garfield corporations. The purported price that 5410 would pay would be \$800,000. Benn would be the record holder of all the stock of 5410. All of this Benn advised Garfield would give the appearance of 5410 being a "bona fide" purchaser for value at a price that Sankin could not or would not meet within the 30 day first purchase period provided by the May 1, 1958 Sankin-Garfield stockholders' agreements. After Sankin failed to exercise his first purchase rights, Benn would assign all of the stock of 5410 to Garfield.

To accomplish the purpose of the scheme devised by Benn many purported legal documents were drawn and signed by Garfield or Benn and in some instances by both between April 6 and May 4, 1959. These included stock purchase agreements, an assignment of money claims, escrow agreements, stock powers, assignments of stock certificates, letters of authorization directed to the escrow agent, the Riggs National Bank, cancellation of the three notes totaling \$800,000 and receipt for 2000 shares of International Timber Corporation stock. Some of these instruments were prepared originally by Benn in his own handwriting and then dictated directly to a typist so that, according to Benn, there would be no shorthand record. All instruments signed by Garfield were done at the urging and direction of Benn so that Sankin

could not attack the "bona fides" of the transaction.

After the purported stock purchase agreements had been entered into between Garfield and Benn on behalf of 5410, the \$800,000 of notes signed by 5410, escrow agreements entered into, and Garfield's stock powers signed, Garfield, his wife and Benn called on Sankin. Except for advising Sankin that he had sold his stock to Benn and that he had no further interest in the corporations, Garfield had little to say as he had been directed by Benn to let the latter do the talking. Benn had much to say to Sankin, among other things that he as the owner of the former Garfield shares would not recognize Sankin's equal voting rights. Garfield resigned as director of and from his offices in Garfield and Sankin, Inc. and Julius Sankin, Inc. Benn was elected in Garfield's stead, and thereafter asserted ownership through 5410 of Garfield's stock interests. On one occasion after taking over Garfield's position, Benn stated to Sankin that he knew he had "overpaid" Garfield for the stock but he did so because it was an advantageous deal since he was using tax free money from out of the country.

[1] Garfield admitted, in his answer and in open court, to scheming with Benn to defraud Sankin. Janet Garfield testified at length to those facts. Benn denied the fraud and claimed he, through 5410, was a bona fide purchaser for value of Garfield's stocks. According to the evidence in this case those three are the only persons in a position to know whether it was with fraudulent motivation that they planned and acted. I have, therefore, been compelled to pass on the credibility of these three in finding that they did work a fraud on Sankin.

Joseph Garfield has confessed to being a party to the fraud worked on Sankin. Such conduct is not to be condoned with respect to anyone and here the conduct is the more grievous since Sankin was Garfield's relative by marriage and a partner for several years in a successful business venture. Moreover, I am aware

that Garfield has a direct interest in the outcome of this proceeding. I have had the benefit of observing Garfield on the witness stand. I noted his appearance, demeanor, and conduct as a witness. I have given consideration to his manner of testifying; I did not find him evasive nor did I note any tendency on his part to distort his testimony. To me he appeared frank and candid in his testimony.

What I found worthy of belief in Garfield I found totally lacking in Benn. The hallmark of his testimony was evasion flavored with contradiction. Time after time he had to be directed to answer the question and not evade. And when he would be compelled to give an answer, it was usually an exercise in circumlocution. His appearance, manner, demeanor and conduct as a witness was that of a person unworthy of belief. He did not look nor did he act as a witness who was telling the truth fully, frankly and freely what he knew to be so.

In fact his appearance and conduct as a witness was so motivated by his most substantial interest in the outcome of this case that he gave testimony without regard to truth.

Furthermore, most improbable is Benn's testimony that, while Garfield sold his $\frac{2}{3}$ interest in the Garfield Apartments, including monies owed to him for \$800,000 as evidence by 5410 notes, thereafter, he (Garfield) marked those notes cancelled and paid in consideration of Benn assigning to him 2000 shares—the entire issue—of the capital stock of International Timber Company. Benn's own testimony disclosed that all International Timber Company claimed as assets was an option to purchase $\frac{1}{2}$ of the shares of Surinam-American Timber Company for \$10,000.00. Benn testified that in October 1958 he owned all of the stock in Surinam-American which he asserted owned timber concessions in Surinam of great value; that in that month he sold his holdings in that corporation for \$20,000.00 with a three year option

to purchase for \$10,000.00 $\frac{1}{2}$ of the shares of Surinam-American. That option, according to his testimony, Benn assigned to International Timber Company. Benn's testimony further disclosed that International Timber Company was of so little consequence that it never had a bank account nor had any of its stock ever been issued prior to May 4, 1959, the day Benn claims 5410's notes were cancelled in consideration of his assigning the Timber Company stock to Garfield.

But even if I were in any state of doubt—which I am not—as to whether I should credit Benn's testimony or that of Garfield, I would be compelled to resolve that doubt against Benn in view of the credence I place in Janet Garfield's testimony which is in direct conflict with Benn's.

I do not condone Janet Garfield's affair with Benn. I do not condone her participation in the fraud worked upon Sankin. I am aware that she considers her husband's property to be hers also and for that reason she can be said to have an interest in the outcome of this case. However, I observed her as a witness who testified at great length and was subjected to proper but searching cross examination. I observed that throughout her testimony she was forthright. She did not evade; when she was unable to answer she so testified. To me she looked and acted as a witness telling the truth fully, frankly and freely, which to say the least was a most embarrassing experience for her. I give her testimony full credence.

As further evidence of the fact that Benn cannot be believed is the candid statement of counsel for 5410. On page 8 of 5410's Reply Brief (filed February 8, 1965) it is stated: "It is conceded that this defendant [5410], as purchaser of two-thirds of the stock, *had actual notice, prior to the purchase, of the existence and the terms of plaintiffs' exhibits 1 and 2.*" (Emphasis supplied.) The exhibits counsel was referring to are the May 1, 1958 Sankin-Garfield stockhold-

ers' agreements.* In contrast to 5410's concession is Benn's testimony that he never saw those agreements until April 23, 1959, which was subsequent to the time 5410 acting through Benn purportedly purchased Garfield's stock interests, and that prior to April 21, 1959, he never knew of Sankin's voting rights in Garfield and Sankin, Inc. and Julius Sankin, Inc. From April 4, 1959, the date Benn conceived 5410, until May 26 and 27, 1959 when he purportedly sold all of 5410's stock to the intervenor-defendants, 5410 was Benn and Benn was 5410. The latter's concession in reply brief must necessarily concede that Benn was aware of the existence and terms of the Sankin-Garfield stockholders' agreements prior to the purported purchase of Garfield's stock by Benn-5410.

[2,3] Benn's testimony of his good faith purchase for value of Garfield's stockholdings in the apartment enterprise is unworthy of credence. I give it none.⁷

[4,5] The facts, as found here, establish the essential elements of fraud, viz: (1) A false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation. *Pence v. United States*, 316 U.S. 332, 338, 62 S.Ct. 1080, 86 L.Ed. 1510, rehearing denied, 316 U.S. 712, 62 S.Ct. 1287, 86 L.Ed. 1777 (1942), *United States v. Kiefer*, 97 U.S.App.D.C. 101, 102, 228 F.2d 448, 449 (1955), cert. denied, 350 U.S. 933, 76 S.Ct. 305, 100 L.Ed. 815, rehearing denied, 350 U.S. 977, 76 S.Ct. 431, 100 L.Ed. 847 (1956). Benn and Garfield falsely represented to Sankin that

Benn's creation, 5410, had purchased for \$800,000 Garfield's stock in Garfield and Sankin, Inc. and Julius Sankin, Inc. They made that false representation in furtherance of the scheme conceived by Benn and participated in by Garfield for the purpose of inducing Sankin to conclude that he either could not or would not meet the inflated price of \$800,000 in order to acquire Garfield's stock interest. Sankin, although considering the price to be excessive, purchased Garfield's stock on the terms represented to him as having been agreed to by 5410 in order to protect his one-third interest and equal voice position in the two corporations.

[6] Garfield in acting as he did with and through Benn violated his fiduciary duty to deal fairly, honestly, and openly with his fellow stockholder Sankin. He not only failed to make disclosure of all essential information to Sankin but, instead joined with Benn and deliberately gave false information to Sankin. *Helms v. Duckworth*, 101 U.S.App.D.C. 390, 394, 395, 249 F.2d 482, 486, 487 (1957).

Without merit is 5410's assertion that no misrepresentation of material fact was made to Sankin because on April 29, 1959, he had seen legible copies of the Benn-5410-Garfield agreements, some of which showed that if 5410 defaulted, the escrowed stock would be returned to Garfield and the escrowed notes to 5410. Those instruments evidence the purported purchase of Garfield's stock for \$800,000; that the stock was placed in escrow along with 5410's nonnegotiable notes; that 5410 would receive the stock upon payment of the notes, two of which were payable on demand and the third and

6. That counsel for 5410 meant plaintiffs' exhibits 2 and 3 rather than as he stated exhibits 1 and 2 is obvious from a reading of the entire paragraph of the brief in which the quoted sentence appears. The very first sentence of that paragraph reads "Plaintiffs' exhibits 2 and 3" and it is with those two stockholders' agreements that the entire paragraph treats. Also reference to plaintiffs' exhibits "2 and 3" is made on page 14 of 5410 Reply Brief. Reiteration of the concession appears on page 18 of that Brief.

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7. During the trial Garfield offered in evidence a certain opinion of the Tax Court of the United States filed in tax litigation involving Benn. Garfield argued that the opinion could be considered with respect to Benn's credibility. I would not admit in evidence that opinion; I have not considered it in concluding Benn's testimony here was unworthy of belief.

largest (\$540,000) had a December 1, 1959 due date. There was no reason for Sankin to believe there would be a default; indeed he was only justified in believing there would not be. On April 21, Garfield had told him he had sold to Benn and Benn claimed ownership. And on April 29, when Sankin was given copies of the Benn-5410-Garfield documents, there were present not only Benn and the secretary-counsel of 5410 but also a representative of Riggs Bank with the Garfield stock which Benn insisted be cancelled and new stock issued to 5410. It was also on April 29, at the same meeting, that the secretary-counsel of 5410 advised Sankin that he had until May 30 to exercise his first purchase right.

Moreover, on May 15, prior to Sankin exercising his purchase right on May 26, Benn told Sankin that he was the only one Sankin could deal with. It was at the same meeting that Benn advised Sankin that he was using tax free money from out of the country and for that reason he had been willing to agree to overpay Garfield.

Inconsistent to say the least is 5410's contention that no misrepresentation was made to Sankin because of the April 29 disclosure of the Benn-5410-Garfield documents, when it is on those very same documents that 5410 bases its claim of ownership to Garfield's stock.

Also unsupportable is the contention made here that Sankin has failed to show that he has suffered any damage as a result of the Benn-5410-Garfield fraud. It is argued that Sankin's \$800,000 notes to Garfield are nonnegotiable, non-interest bearing and impose no personal liability on Sankin. But that argument disregards the facts (1) that the notes in amount and form are as Garfield required of Sankin and (2) that Garfield's stockholdings which were sold, assigned and transferred to Sankin on May 26, 1959, would, under the terms of the pledge agreement, revert to Garfield if Sankin was unable to pay the notes when due.

By the March 14, 1959 stock purchase agreements between Garfield and Benn-

5410, the parties acknowledged Sankin's rights to purchase Garfield's stock but they agreed that for him to make such purchase he would have to do so "upon the same terms and conditions" as were agreed to by Benn-5410. Sankin knew of those agreements when he was furnished legible copies on April 29, 1959. And more than that he was told he would have to meet Benn-5410's terms and conditions when in mid-May, 1959 he tried to purchase $16\frac{2}{3}$ shares in each corporation and again on May 26 when he signed the notes for \$800,000.00.

Benn-5410, pursuant to the fraudulent stock purchase agreements, made and executed one promissory note in the amount of \$200,000.00 and a second promissory note in the amount of \$60,000.00. Both of those notes were nonnegotiable, non-interest bearing and payable upon demand. The third note made and executed was in the amount of \$540,000.00. It also was nonnegotiable, non-interest bearing but payable on or before December 1, 1959. Sankin's notes were in exactly the same terms.

The notes executed by Benn-5410 were placed in escrow with The Riggs National Bank as were Garfield's stock certificates. The escrow agreements provided that if Benn-5410 defaulted in payment, the stock was to be returned to Garfield and the notes "and any cash payments held by the escrow agent for the account of" Garfield were to be returned to Benn-5410. There was no liability imposed on Benn-5410 for the payment of the notes. And at the time the escrow agreements were entered into there was no assignment and transfer of the stock to Benn-5410.

[7] But unlike Benn-5410, Sankin on May 26, 1959, actually acquired title to Garfield's stock, the same having on that date been sold, assigned and transferred to Sankin by Garfield. To secure the \$800,000.00 purchase notes Sankin pledged the stock with Garfield. The pledge agreement provides that should Sankin fail, refuse or default in the payments of the notes, Garfield could mark the notes paid and return them to Sankin

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and Garfield would be restored to ownership of the stock. But if Sankin is to retain title to the stock he must pay the notes. By this action and through the relief he seeks, he has evidenced his intent to retain ownership. Thus he is liable for the \$800,000.00, a fraudulently inflated price and the damage he has suffered is the difference between that amount and the reasonable value of the Garfield stock.

Garfield asserts that the damage, if any, that Sankin suffered was self inflicted. He argues that Sankin could have rescinded his stock purchase contract with Garfield on May 28, 1959 when Sankin first learned of the fraud; that since Sankin did not he approved the purchase of the stock at the fraudulently inflated price and that he, therefore, cannot complain of the damage he suffered. Garfield cites *Simon v. Rossier*, D.C. Mun.App., 127 A.2d 394 (1956) as one authority for that position. But the *Simon* case was treating with an executory contract. The purchaser of the house in that case had done nothing but make a deposit of \$547.50 at the time he learned of the fraud in the inducement of the contract to purchase. *Rossier*, the purchaser had been induced to purchase the house on the false representation that it would be built and delivered within sixty days. In fact, construction was not even begun within that time. *Rossier* being aware of this fact, nevertheless, requested the defendant to build the house as soon as possible. He, therefore, waived any action for fraud.

[8] Here, Sankin's purchase of Garfield's stock was an accomplished fact. His position was like that of the purchaser of real estate in *Hale v. Helvering*, 66 App.D.C. 242, 85 F.2d 819 (1936), to whom title was transferred upon payment of \$20,000.00 in cash and \$40,000.00 in notes secured by a first mortgage. The Ninth Circuit Court of Appeals in analyzing the facts in *Hale* stated: "It is evident that in that case the original transaction had been *fully* completed, as to all parties. Title to the property had been transferred and *new obligations*

were created, promissory notes, secured by mortgage." *Wener v. Commissioner of Internal Revenue*, 242 F.2d 938, 943 (9th Cir. 1957). (Emphasis as in reported case.)

Garfield has overlooked the fact that what Sankin did on May 26, 1959, was to exercise his rights provided him by the May 1, 1958 agreements—written and oral. He was induced to agree to the \$800,000.00 price for the stock as a result of the Garfield-Benn-5410 fraud. In the District of Columbia "[o]ne who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; * * *." *Wyatt v. Madden*, 59 App.D.C. 38, 39, 32 F.2d 838, 839 (1929). See also *United Securities Corporation v. Franklin*, D.C.Mun.App., 180 A.2d 505, 510 (1962).

[9] Moreover, this is a case "where the defrauded party may, by reason of the wrong, be unable to recede from his situation without prejudice." *Kingman & Co. v. Stoddard*, 85 F. 740, 749 (7th Cir. 1898). On May 28, 1959, when Sankin learned for the first time of the Benn-5410-Garfield fraud on him, he knew that unless he was able to retain the stock he had acquired from Garfield on May 26, he would have as his partner in the two close corporations either Garfield or 5410 which to him was Benn. Neither could be a satisfactory partner. Garfield, with whom he had been so closely associated for several years in business and to whom he was related through marriage, had seen fit to have participated in a fraudulent conspiracy to deprive him of his equal voting rights, which were the very rights that Garfield had agreed he should have. Benn he had come to know too well in the month past. Under the threat of placing the two corporations in receivership Benn has compelled Sankin to disburse \$24,000.00 of Garfield and Sankin, Inc. funds to Benn. Moreover, constantly since April 21 Benn had been asserting that he would refuse to recog-

are Sankin's equal voting rights. Under such circumstances, a rescission would not afford Sankin an adequate remedy and therefore he was not obliged to rescind even if it were possible for him to do so. *Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 116 F.2d 823, 833 (6th Cir. 1941). See also *Horning v. Ferguson*, D. C. Mun. App., 52 A.2d 116, 119 (1947).

Some of the defendants contend that Sankin could have suffered no damages because of a May 26, 1959 indemnity agreement between him and Garfield. By that agreement Garfield contracted to indemnify and hold harmless Sankin " * * * from and against all damages, loss, costs and expenses arising or growing out of any claim, demand, action or cause of action asserted against the said Julius Sankin by any person, firm or corporation and resulting from or arising out of any and all transactions between Joseph A. Garfield, on the one hand, and James T. Benn or 5410 Connecticut Ave. Corporation, a District of Columbia corporation, on the other hand, relating to the sale by Joseph A. Garfield and the purchase by 5410 Connecticut Ave. Corporation of capital stock in Garfield & Sankin, Inc. or Julius Sankin, Inc., each District of Columbia corporations (sic), or resulting from or growing out of the purchase by Julius Sankin from Joseph A. Garfield of any of the capital stock of the said Garfield & Sankin, Inc. or of the said Julius Sankin, Inc. * * *."

[10] When Sankin entered into the indemnity agreement of May 26, 1959, he was unaware of the Garfield-Benn-5410 fraud worked upon him. But he did know then and had known from April 21, 1959, that Garfield had advised him that the stock had been sold to Benn and that Garfield had no further interest in the two Garfield apartment corporations. He also knew that Benn had asserted ownership through 5410 of the Garfield stock and that he would have to purchase that stock from Benn-5410. And he also learned from Garfield that he would have to purchase all of Garfield's stock from Garfield. Faced with conflicting claims of Garfield and Benn-5410, Sankin did

the prudent thing when he demanded, at the time he purchased the Garfield stock, that Garfield indemnify him against any claims asserted by Benn-5410 or anyone holding under them. As a result of that agreement Garfield has paid on behalf of Sankin certain attorneys fees and costs resulting from the claims asserted against Sankin in this action by Benn-5410 and the five intervenor defendants. But those compensated costs have no bearing on the damage Sankin has suffered because of the \$800,000.00 fraudulently inflated purchase price he was required to meet in order to exercise his first right to purchase Garfield's stock.

[11] Nor can it be said that Sankin's May 26, 1959 general release to Garfield constitutes a waiver of the damages suffered by Sankin. On the day he executed the release, he was unaware of the fraud although Garfield, the party released, was well aware of that fact. But while Garfield kept Sankin uninformed he accepted, if he did not demand, the release at the same time he executed a general release to Sankin.

Also on May 26, 1959, Sankin and Garfield executed three other instruments. Two were voting trust agreements, one pertaining to Garfield and Sankin, Inc. stock and one to Julius Sankin, Inc. stock. The third agreement was a stockholders' agreement relating to the restrictions on disposition of that stock. None of those agreements would become effective unless Sankin defaulted in the payment of the \$800,000.00 notes. In the event of such a default those agreements would give each stockholder the right of first purchase of the other's stock and pending such disposition each stockholder would in effect have an equal voice in the affairs of the corporations through the voting trust agreements. All three agreements provided that there would be endorsed on the stock certificates the restrictions provided by the agreements. Sankin on May 1, 1958, agreed to Garfield's request that no endorsements be placed on the stock certificates. By May 26, 1959, he had learned, through Garfield's breach of his fiduciary duties and

the conduct of Benn, that his 1958 willingness to assist his erstwhile partner brought him nothing but trouble. He would not let that happen again. However, the effect of the voting trust agreements and the stock transfer restriction agreement is moot here since Sankin seeks delivery of Garfield's stock which he purchased on May 26, 1959 and compensation for the damages he has suffered because of Garfield-Benn-5410 fraud.

While conceding that Benn-5410 had actual notice before purchase of the Garfield stock of the May 1, 1958 agreements providing equal voting rights as well as the right of first purchase to Sankin, 5410 contends that those limitations and restrictions on Garfield's stock are unenforceable against "a transferee as a matter of public policy prescribed by statute, regardless of actual prior notice by the purchaser." Benn and the intervenor-defendants assert the same proposition, that is that the limitations and restrictions in the May 1, 1958 agreements are unenforceable as being contrary to statute.⁸ The statutory provisions those defendants contend apply here are the following:

§ 28-2915, D.C.Code (1961):⁹

There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaws of such corporation, or otherwise, unless

the right of the corporation to such lien or the restriction is stated upon the certificate.

§ 29-239, D.C.Code (1961):

* * * All certificates for stock which has no voting powers or is restricted or limited as to its voting powers, * * * shall have a statement of such restriction, limitation * * * plainly stated thereon.

§ 29-908, D.C.Code (1961):

(a) Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, with such designations, preferences, voting powers, special or relative rights and such limitations, restrictions, or qualifications thereof as shall be stated in the articles of incorporation. The articles of incorporation may limit or deny the voting power of the shares of any class.

§ 29-911, D.C.Code (1961):

(a) Unless otherwise provided in the articles of incorporation, each outstanding share shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders.

Act of June 8, 1954, Ch. 269, § 20, 68 Stat. 189 formerly § 29-908g of D.C.Code:¹⁰

(b) Every certificate representing shares issued by a corporation which

8. While Benn contends that he and 5410 had no notice of the stock restrictions prior to purchase, he also argues that if they had notice the restriction would be unenforceable as against them as a matter of public policy prescribed by statute.

9. § 28-2915, D.C.Code (1961) was repealed by the Uniform Commercial Code, Act of Dec. 30, 1963, 77 Stat. 631 et seq., Pub.L. 88-243, effective January 1, 1965. However, as provided by section 16 of the Act, that repeal does not affect the applicability here of § 28-2915, if it be otherwise applicable, since the purported stock transfer at issue here ante-

dated the effective date of the repealing Act. This opinion refers to the 1961 D.C.Code, rather than the recently issued 1967 Code because the briefs filed by the parties cite the 1961 Code. However, with the exception of § 28-2915, D.C.Code (1961), all other 1961 citations remain unchanged in the 1967 Code and bear the same Code citations.

10. In their briefs in reply to plaintiff's brief on complaint, 5410 and intervenor-defendants cite § 29-908g, D.C.Code (1961). That provision would in no event be applicable here since it was the result of a July 23, 1959 amendment which did not become effective until 60

is authorized to issue shares the transferability of which is restricted or limited shall state upon the face or back thereof, in full or in the form of a summary, all of the limitations and restrictions upon the transferability thereof.

[12] In considering defendants' contentions with respect to the foregoing Code provisions, it should be first noted that § 29-239, D.C.Code (1961) has no application. It is a provision of the Business Corporation Act of 1901, as amended, § 29-201 et seq., D.C.Code (1961). Garfield and Sankin, Inc. and Julius Sankin, Inc. are District of Columbia corporations organized in April, 1958. They could only have been incorporated under the Business Corporation Act of 1954, § 29-901 et seq., D.C.Code (1961), Act of June 8, 1954, 68 Stat. 179. Section 146 of that Act provided that the Business Corporation Act of 1954 would take effect 180 days after June 8, 1954, and that thereafter no corporation eligible to be formed under it could be incorporated under any other Act then in force in the District of Columbia, which included the 1901 Act. Garfield and Sankin, Inc. and Julius Sankin, Inc. were eligible to be formed under the 1954 Act since they were and are corporations for profit and exercise powers as contemplated and conferred by that Act. See §§ 29-903, 29-904, D.C.Code (1961).

An examination of the articles of incorporation of both Julius Sankin, Inc. and Garfield and Sankin, Inc. evidence the fact that they conform to § 29-908 (a), D.C.Code, (1961). The articles of Julius Sankin, Inc. provide for one class of capital stock numbering 100 shares without par value. Those shares are without limitations, restrictions or qualifications; the articles of incorporation neither limit nor deny the voting power of the shares. Since the articles do not

otherwise provide, each of those 100 shares is entitled to one vote on each matter submitted to a vote at a meeting of stockholders as provided by § 29-911, D.C.Code (1961).

The Garfield and Sankin, Inc. articles of incorporation authorize two classes of stock, preferred and common. There are 100 shares of preferred stock with a par value of \$1.00 per share. The common stock is divided into 100 shares with each share having a \$10.00 par value. Provision is made by the articles of incorporation for voting power in the preferred stock in certain circumstances not material here. At all other times the voting power is in the holders of the common stock. Since the Garfield and Sankin, Inc. articles are silent as to the distribution of that voting power, § 29-911, D.C.Code (1961) gives to each share one vote on each matter submitted to a vote at a meeting of shareholders.

[13] And the May 1, 1958 agreements between Sankin and Garfield concerning their common stock holdings in the two corporations does not alter the voting power of each share of such stock. Stated in identical language in those two agreements, Garfield and Sankin agreed that "each shall have an equal vote in the affairs of the corporation", that is that neither "can have a larger or greater vote than the other irrespective of the numerical amount of stock owned" by each. Those agreements do not take from Garfield's shares any voting power as indeed they could not since it is the statutes and the articles of incorporation which give the voting power to the shares. What Garfield did by those agreements was to forego for and on behalf of himself, his heirs and assigns voting one-half of his holdings of 66⅔ shares and thus he made possible an equal voice for Sankin, his heirs and assigns. Such was the arrangement of the pre-

days later. Act of July 23, 1959, 73 Stat. 240, Pub.L. 86-106, §§ 3, 18. The provision set forth in the above text was in effect on May 1, 1958 and until 60 days after July 23, 1959. How-

ever, from defendants' arguments it would appear that they would contend that the provisions quoted in the text would be equally applicable.

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May 1, 1958 partnership agreement which brought Garfield with his money and Sankin with his money, his know-how and his personal services together for their mutual advantage in the apartment house enterprise.

No District of Columbia authorities have been cited or otherwise have come to my attention respecting the validity of contracts of the nature of the Sankin-Garfield May 1, 1958 agreements. However, it would seem that "ownership of voting stock imposes no legal duty to vote at all" would be a principle that should find general acceptance. That principle was approved by the Supreme Court of Delaware in *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 29 Del.Ch. 610, 53 A.2d 441, 447 (1947). In that case two of the three stockholders agreed to vote their stock jointly or unitedly. And while each voted her entire shares her voting power was limited to a joint effort—so much so that if agreement between the two could not be reached on the object of their joint effort a named arbitrator was to decide how the stock should be voted. In holding that agreement valid the court stated that a stockholder had no legal duty to vote any of his shares. Here there are but two stockholders, Garfield and Sankin. They had a common objective to make a profitable venture out of their apartment house enterprise. If Garfield in accomplishing that objective could have decided not to vote any of his stock he surely could agree to vote only half of his shares which is exactly what he did.

In *Trefethen v. Amazeen*, 93 N.H. 110, 36 A.2d 266 (1944), the Supreme Court of New Hampshire ruled on a stockholders agreement which provided that one stockholder would withhold voting certain of his shares in order that two other stockholders would have a 50% voting power. The one stockholder agreed to limit his voting so that the corporation could secure additional working capital. The court in approving the agreement stated that the "validity of a contract between stockholders is to be determined by

the effects of its provisions." *Id.* at 111, 36 A.2d at 267. There the court pointed out that the contract worked no injury to the corporation, stockholders or creditors from the addition of new funds; that the only detriment was to the parties, namely, the paying out of money by two of them and the loss of voting rights by the third party, all of which detriment had been contracted. As there so here. The Garfield-Sankin agreements worked no injury to the corporation or its creditors. They are the only two stockholders. The detriment suffered was Garfield withholding voting 33⅓ shares of his stock and Sankin giving his services and know-how to their joint enterprise.

Nickolopoulos v. Sarantis, 102 N.J.Eq. 585, 141 A. 792 (E. & A. 1928) is cited for the proposition that a stockholders' agreement altering the voting power of any share of stock is invalid. There the New Jersey Court of Errors and Appeals refused to enforce an agreement which gave one stockholder, who owned 25 percent of the stock, a 50 percent vote in the affairs of the corporation. In that case four persons, including the plaintiff, owned all the stock. As is apparent from its opinion the court was concerned with what such a "secret agreement" might do in other circumstances such as where " * * * stockholders not parties to the agreement and others dealing with the corporation would be in complete ignorance." *Id.* at 586, 141 A. at 793.

[14] The New Jersey court was concerned with the effect of the restrictions in a stockholders' agreement on the innocent and unwary. But the defendants and intervenor-defendants were neither innocent nor unwary. They knew of the restrictions in the Sankin-Garfield stockholders' agreements. Garfield entered into the agreements with Sankin. When he became unhappy with them, upon his wife's urging, he went to Benn and revealed to him the terms of the agreements. Benn had brought into being 5410 for the purpose of providing a cover for their fraudulent activities. The in-

Intervenor-defendants.
5410's stock from Benn knew of the Sankin-Garfield stockholders' agreements. Benn-5410 and the intervenor-defendants now ask this Court to condone the fraudulent activity of Benn-5410-Garfield by holding invalid the stockholders' agreement by which Garfield agreed to forego voting one-half of his stock holdings. Sufficient here is the recent utterance of the Court of Appeals for this Circuit: "This record discloses a cleverly conceived and boldly executed fraud to which judicial approval cannot be given." *Fontana v. Aetna Casualty & Surety Co.*, 124 U.S.App.D.C. 168, 171, 363 F.2d 297, 300 (rehearing en banc denied, August 4, 1966).

Notwithstanding the fraud that brings this case to this Court, Benn-5410 and the intervenor-defendants seek to have the Garfield-Sankin stockholder agreements declared invalid for a second reason, that is that the right of first purchase in each stockholder is not noted on the face or back of the stock certificates. In support of their position those defendants cite § 28-2915 and § 29-908g, D.C. Code (1961) as quoted supra. There being no District of Columbia cases construing those Code sections, they cite decisions of other jurisdictions.

An examination of the cited cases discloses that they upheld transfers of stock notwithstanding a restrictive by-law or other agreement where the restriction was not noted on the certificates as provided by statute. And in some instances the purchaser had actual notice of such restrictions at the time he purchased the stock.¹¹ But in none of those cases was the transfer the result of the fraud of the transferor and transferee.

Plaintiff, on the other hand, has cited cases which treat with the question of

whether parties possessing knowledge of a restrictive by-law or agreement may utilize the statutory provisions cited by defendants as a shield to protect themselves from the consequences of their unconscionable action.

[15] In *Doss v. Yingling*, 95 Ind. App. 494, 172 N.E. 801 (1930), plaintiff brought the action to enjoin a stockholder (Yingling) from transferring corporation stock except in accordance with the terms of a stockholder's agreement and a company by-law. He also sought to enjoin the company treasurer from effectuating such transfer on the corporation's books. The stockholders' agreement, evidenced by a corporation by-law, provided that if a stockholder desired to sell his stock the remaining stockholders were to have the first right to purchase such stock. Plaintiff asserted that defendant Yingling, whose certificate of stock did not recite the by-law restriction, was threatening to transfer and assign for value some of his stock to some "innocent purchaser" who was not a stockholder and "who has no notice of the above-mentioned agreement and by-law * * * in order to defeat [plaintiff's] rights in said corporation." The trial court sustained a demurrer to the amended complaint. That judgment was reversed on appeal. The appellate court, in considering an Indiana statute, substantially identical to § 28-2915, D.C.Code (1961), stated:

"The above act of our Legislature in relation to the transfer of stock was 'designed for the protection of innocent purchasers of stock, in the open market or otherwise, and not at all as a shield by one with knowledge of a condition to unconscionably protect himself from the consequences thereof.'" *Id.* at 497, 172 N.E. at 804.¹²

11. See for example among the cases cited: *Costello v. Farrell*, 234 Minn. 453, 48 N.W.2d 557, 29 A.L.R.2d 890 (1951), *Hopwood v. Topsham Telephone Co.*, 120 Vt. 97, 132 A.2d 170 (1957), *Sorrick v. Consolidated Telephone Company*, 340 Mich. 463, 65 N.W.2d 713 (1954), *Age*

Pub. Co. v. Becker, 110 Colo. 319, 134 P.2d 205 (1943).

12. § 28-2915, D.C.Code (1961), as well as the Indiana statute, was first drafted as § 15 of the Uniform Stock Transfer Act. § 29-908g, D.C.Code (1961), as originally enacted or as amended by the

The Indiana Appellate Court in so ruling quoted in part from the opinion in *Baumohl v. Goldstein*, 95 N.J.Eq. 597, 124 A. 118 (ch. 1924), which plaintiff also cites. The latter case was brought by a corporation and two of its stockholders to impress a trust on certain of the corporation's stock, to require the transfer of that stock from one of the defendants to the corporation, and to enjoin the voting and transfer of that stock. A by-law of the corporation conditioned the right to transfer stock by a stockholder to the corporation's option to purchase it. The court upheld the validity of the by-law. One of the original stockholders transferred, with the consent of the corporation, his shares to his wife. Thereafter she sold and assigned those shares to another of the original stockholders without first offering them to the corporation in compliance with the by-law. When the purchaser of the shares sought to have them transferred to him on the books of the corporation, the action was instituted. The court found the purchaser to be in a position of trust and confidence with respect to the corporation since he was at the time of the purchase of the shares, and had been from the creation of the corporation, an officer and director. He was in no position to plead that he was innocent of the restricting by-law. In holding that § 15 of the Uniform Stock Transfer Act¹³ did not support the assignee stockholder in his opposition to the complainants' motion for a preliminary injunction, the court stated:

This act, of course, was designed for the protection of innocent purchasers of stock, in the open market or otherwise, and not at all as a shield by one with knowledge of a condition to unconscionably protect himself from the consequences thereof. * * * As has been said so often, laws are passed for the protection of rights and not

for the purpose of aiding in the perpetration of fraud. *Id.* at 600, 124 A. at 121.

[16] But it is for the very purpose of aiding in the perpetration of the Garfield-Benn-5410 fraud that this Court is being asked to hold the purported transfer of stock to Benn-5410 valid because the Garfield-Sankin restrictive agreements were not disclosed on the stock certificates. In denying that request this Court "need look no further than the maxim that no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232, 79 S.Ct. 760, 762, 3 L. Ed.2d 770 (1959).

[17] And again Benn-5410 and the intervenor-defendants would have the May 1, 1958 stockholders' agreements declared invalid as being too indefinite. But those defendants in making such a contention have overlooked what the record discloses as to the origin and the purpose of those agreements, as well as the contracting parties' contemporary agreement with respect to those written agreements. The evidence adduced in this case makes known that in 1956 Garfield and Sankin individually bought the real estate on which the Garfield Apartments were subsequently built. In August of 1957 Garfield and Sankin as partners entered into a memorandum of understanding. So far as pertinent here that memorandum provides that an apartment house was to be erected on the premises; that Garfield was to have a $\frac{2}{3}$ interest and Sankin a $\frac{1}{3}$ interest in the profits and losses of the enterprise; that if Garfield and Sankin were the only stockholders in a corporation to be organized, the decisions to be made would be "on an equal basis regardless of interest."

In order to obtain F.H.A. financing two corporations were organized. Gar-

Act of July 23, 1959 (see note 10), would in no way alter the ruling in the *Doss* case since that section only relates to the extent of the statement that should appear on the stock certificate.

¹³ 281 F.Supp. — 354½

13. § 28-2915, D.C.Code (1961), see note 12.

field and Sankin, Inc. was to own the apartment house property. Julius Sankin, Inc. was to build the premises but not own them. To continue to maintain as near as possible their close relationship as partners, Garfield and Sankin entered into the May 1, 1958 stockholders' agreements. By the terms of those agreements each was to have an equal vote in the affairs of the two corporations regardless of the fact that Garfield owned $\frac{2}{3}$ of the shares and Sankin owned $\frac{1}{3}$ of the shares and that the profits and losses were to be divided on that two-third and one-third basis. Moreover, each of the former partners, now the sole stockholders in the two close corporations, did not want to have forced upon him as a fellow stockholder someone who might be undesirable. Thus the stockholder agreements provided that if either stockholder wished to dispose of his stock in either corporation he would first offer that stock upon thirty days written notice to the other stockholder.

The pertinent provision of each of the stockholders' agreements reads:

3. It is further agreed by the undersigned that each stockholder and his heirs and assigns will not dispose of any of the shares without first offering same upon 30 days written notice to the other stockholder or stockholders.

Intervenor-defendants argue that that provision is indefinite and, therefore, invalid since it does not state the number of shares which the stockholder having the right of first purchase is privileged to buy. They contend that Sankin's effort to buy $16\frac{2}{3}$ shares instead of all of Garfield's $66\frac{2}{3}$ shares in each corporation is evidence of such indefiniteness. It is difficult to believe intervenor-defendants are serious in making such an assertion. The language is very clear that before Garfield could dispose of "any" of his shares he had to give Sankin 30 day written notice. Garfield in furtherance of his fraud gave Sankin no-

tice that he was going to dispose of all of his shares—although he erroneously stated that he *had* sold those shares to 5410. Sankin at first offered to buy $16\frac{2}{3}$ shares in each corporation in order to preserve his equal voting position without question. Garfield refused to sell $16\frac{2}{3}$ shares. Then Sankin within the period allowed purchased all of the shares owned by Garfield.¹⁴ Thus Sankin exercised his first right to buy. The number of shares he was "privileged" to buy were the shares that Garfield wanted to sell—in this case purportedly all of his shares.

Nor is there anything to defendants' contention that Garfield could sell his shares to his heirs or assigns without first offering them to Sankin for a 30 day period—or as here until May 30. As has been shown from the record here Garfield and Sankin were originally partners. When in order to obtain F.H.A. financing they organized the two corporations, they considered their relationship as stockholders as close as it had been as partners. Neither wanted to have forced on him an undesirable fellow stockholder. But that protection would be lost if either could sell his shares to an heir or assign without first offering the stock to his fellow stockholder. However, if an heir acquired the shares through inheritance, or if an assign acquired through purchase in a case where the first purchase right was not exercised, the agreements provided that such heir or assign could not thereafter dispose of the acquired shares without first offering them to the other stockholders. See *Bishop v. Vose's Estate*, 162 F.Supp. 92 (D.Virgin Is.1958), *aff'd*, 264 F.2d 244 (3rd Cir. 1959), *Black and White Cabs of St. Louis, Inc. v. Smith*, 370 S.W.2d 669, 675 (Mo.App. 1963).

What Garfield did in executing the May 1, 1958 agreements, so far as the above quoted provision is concerned, was to give to Sankin a right of first re-

agreed that Sankin could have until May 30 to exercise his purchase right. See *supra* p. 532.

14. The purchase was made on May 26, 1959 more than 30 days after notice to Sankin, but Garfield and Benn-5410 had

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fusal or pre-emption. That right in Sankin required Garfield, when he decided to sell his shares, to first offer them to Sankin either at a bona fide offer price or at a price based on reasonable value—to be discussed hereafter—and Sankin then had the election to buy or to forego purchasing the stock. Until Sankin elected not to buy, or until his 30 day election period terminated without his buying the stock—or in this instance until May 30, 1959—Garfield could not accept an offer made to him by a third party. Even if Garfield and Benn-5410 had been acting in good faith, it would have been a violation of duty for Garfield to have sold his stock to Benn-5410 on any terms—including a sale made subject to Sankin's right until the latter failed to exercise his pre-emption right within the time allowed. 1A Corbin, Contracts § 261, at 474, (1965); Wellmore Builders, Inc. v. Wannier, 49 N.J.Super. 456, 140 A.2d 422, 427 (App.Div.1958); Kaminsky v. Kahn, 13 A.D.2d 143, 213 N.Y.S.2d 786 (1961), Allen v. Biltmore Tissue Corporation, 2 N.Y.2d 534, 161 N.Y.S.2d 418, 141 N.E.2d 812, 61 A.L.R.2d 1309 (1957), Model Clothing House v. Dickinson, 146 Minn. 367, 178 N.W. 957 (1920).

And finally Benn-5410 and the intervenor-defendants assert that the stockholders' agreements are uncertain and therefore invalid because they leave undetermined the amount the purchasing stockholder would have to pay for the stock in the exercise of his pre-emption right. If all there was to the agreements was the provision quoted above there might well be merit to this contention. However, the record makes evident that the May 1, 1958 written instruments did not constitute the entire agreement between Sankin and Garfield.

At the time the May 1, 1958 documents were being signed, counsel for the two corporations advised Garfield and Sankin that it was the practice in the District of Columbia to endorse on stock certificates voting and transfer restrictions. Garfield demurred to that practice being followed with respect to the stock of

Garfield and Sankin, Inc. and Julius Sankin, Inc. The reason Garfield gave for his objection was that he did not want his wife to know about the restrictions. But he acknowledged that such restrictions were binding on the stockholders. Sankin agreed not to require the certificates to bear the restriction endorsements. And at the same time the parties orally agreed that the price to be paid for the stock by the purchasing stockholder in the exercise of his first right of purchase would be a bona fide price offered by a third party or the reasonable value of the stock at the time of the purchase if the selling stockholder had received no bona fide offer from a third party.

[18] The record here makes clear that Garfield and Sankin did not adopt the May 1, 1958 written instruments as statements of their whole agreements. In such a case, "the law does not exclude proof by parol evidence of a contemporaneous agreement in addition to and not inconsistent with or a variation of a written agreement between the same parties." *Brewood v. Cook*, 92 U.S.App. D.C. 386, 388, 207 F.2d 439, 441 (1953); *Murray v. Lichtman*, 119 U.S.App.D.C. 250, 339 F.2d 749 (1964).

[19,20] A contract is sufficiently definite for enforcement which provides that one who has the right of first purchase shall pay the price set by a bona fide offer. *Gutch v. Meccia*, 142 N.J.Eq. 430, 431, 60 A.2d 649, 650 (Ch.1948). *R. F. Robinson Co. v. Drew*, 83 N.H. 459, 461, 144 A. 67, 69 (1928), 5A Corbin, Contracts § 1174, at 289 (1964); 1A Corbin, Contracts § 261(5), at 470 (1963). Nor is the contract made indefinite by the alternative provision that, if a stockholder desired to sell and had received no bona fide offer from a third party, the purchasing stockholder in exercising his purchase right would pay the reasonable value of the stock at the time of purchase. *Howard v. Fitzgerald*, 58 Wash.2d 403, 405, 363 P.2d 386, 388 (1961), 1 Corbin, Contracts § 99, at 444, (1963).

The present assertion of Benn-5410 and the intervenor-defendants is diametrically opposed to their position before this action was instituted. Benn proposed to Garfield the \$800,000.00 stock purchase price as a means of making it impossible or undesirable for Sankin to exercise his first purchase right. Benn-5410, through the secretary-counsel of 5410, confirmed in writing to Sankin that his "30-day option to purchase" expired May 30, 1959. The May 26, 1959 agreement between Benn and the five intervenor-defendants acknowledged Sankin's "30-day purchase option." Later that day and again on May 27, 1959, after Benn and the intervenor-defendants learned of Sankin's purchase of Garfield's stock, they did not protest that Sankin had no right to acquire that stock; their sole concern then was that the purchase price be paid to 5410 and not to Garfield. But Sankin's first purchase rights are as recognizable today as they were to Benn-5410 and the intervenor-defendants before this suit was filed. It is only their position which has changed and that is without support.

The 66⅔ shares of Garfield and Sankin, Inc. stock and the 66⅔ shares of Julius Sankin, Inc. stock which Garfield sold, assigned and transferred to Sankin on May 26, 1959, now in the registry of this Court, will be delivered to Sankin. He will pay Garfield the \$800,000.00 purchase price less the amount of damages he sustained by the fraud worked upon him by Garfield-Benn-5410. The amount of the damages will be treated more particularly hereafter.

15. On October 8, 1959 complaint in intervention was filed. Plaintiffs' complaint was amended on October 21, 1959 to add the intervenors as defendants. In October, 1963 after several days of trial intervenors took the position that they were not defendants and cited a prior order which had been entered. The Court reaffirmed the holding that they were defendants and that they had been since October 21, 1959. Due to the confusion existing as to the prior order and intervenors' contention that they had not

II Intervenor-Defendants' Complaint in Intervention against Sankin and Garfield.

Intervenor-Defendants' Counterclaim against Sankin.¹⁵

In their complaint in intervention, intervenor-defendants assert that they are the owners of all the capital stock of 5410 and that it is that corporation and not Sankin which owns what originally was Garfield's 66⅔ shares of stock in Garfield and Sankin, Inc. and 66⅔ shares of stock in Julius Sankin, Inc. They request that an order be entered transferring those shares, now in the registry of the Court, to 5410. In that connection they ask this Court to declare Sankin's first right of purchase to be legally unenforceable, or, alternatively, that Sankin did not validly exercise that right, or, as a second alternative, that, if Sankin did have a legal right to the stock and had validly exercised it, he be ordered to make payment to 5410.

By their counterclaims intervenor-defendants seek to have this Court find that Sankin conspired with Garfield to deprive 5410 of the original Garfield stock. They request that Sankin be required to render an accounting with respect to all financial transactions and activities of Garfield and Sankin, Inc. and Julius Sankin, Inc. since May, 1959. They further request that a judgment be entered in their favor against Sankin for both compensatory and punitive damages, as well as costs and attorneys fees.

[21, 22] In view of the judgment that is being entered for Sankin on his complaint, as well as what has heretofore

answered and were not prepared to defend against plaintiffs' complaint, a mistrial was ordered. Thereafter, on October 28, 1963 intervenor-defendant Pardo filed his separate answer, counterclaim and cross claim and on December 9, 1963 the other four intervenor-defendants filed their answer, counterclaim and cross claim. Intervenor-defendant Pardo on December 16, 1963 filed an amendment to his answer to plaintiffs' complaint.

been stated in this opinion about his rights and as to how he has been the victim of fraud, the claims of intervenor-defendants are without merit and their complaint in intervention and counterclaims will be dismissed with costs. As to their assertion that Sankin conspired with Garfield to deprive 5410 of Garfield's stock holdings in the apartment building enterprise, it is sufficient to state, that that assertion is without support in the record.

With respect to Garfield, the intervenor-defendants through their complaint in intervention, as modified at pretrial of May 29, 1962, seek affirmative relief.¹⁶ They request that they be declared the sole owners of the stock of 5410; that Garfield be estopped from asserting claims detrimental to their interests as 5410 stockholders, including both efforts to void 5410's title to the stock Garfield formerly owned in the apartment building corporations and his claim of ownership of 100 shares of 5410 stock. And finally they pray that they be awarded compensatory damages.

[23] The relief sought by intervenor-defendants against Garfield will not be granted. "It is elementary, of course, that one seeking equity must do equity and must show 'clean hands' at the threshold." *Udall v. Littell*, 125 U.S.App. D.C. 89, 96, 366 F.2d 668, 675 (1966), cert. denied, 385 U.S. 1007, 87 S.Ct. 713, 17 L.Ed.2d 545 (1967). Here the record shows that the intervenor-defendants have unclean hands as a result of the fraud in which they joined Benn in perpetrating on Garfield.

[24] The relationship of the five intervenor-defendants to Benn and their purported purchase from him of 250 shares of 5410 stock have hereinbefore

been recited at length. Those facts make clear they knowingly entered into a conspiracy with Benn to take from Garfield the "dummy" corporation Benn had created for fraudulent purposes. Their protestations of their innocence in their testimony are not accepted by me. I find that they joined with Benn to defraud Garfield.

Intervenor-defendants' claims against Garfield being predicated on their own fraud against him shuts the doors of this Court to their plea for relief. *Cochran v. Burdick*, 67 App.D.C. 87, 90, 89 F.2d 831, 834 (1937); *Brantley v. Skeens*, 105 U.S.App.D.C. 246, 251, 266 F.2d 447, 452 (1959); *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381 (1945), rehearing denied, 325 U.S. 893, 65 S.Ct. 1189, 89 L.Ed. 2005 (1945). And this Court may invoke the clean hands maxim "irrespective of whether the parties to the action urge it or not." *Brantley v. Skeens*, supra, 105 U.S.App.D.C. at p. 252, 266 F.2d at 453. Intervenor-defendants' complaint in intervention and counterclaim will be dismissed.

III 5410's Counterclaim against Sankin

5410's Cross claim against Garfield, Garfield and Sankin, Inc. and Julius Sankin, Inc.

In its counterclaim and cross claim 5410 claims that Sankin and Garfield have misappropriated funds of Garfield and Sankin, Inc. and Julius Sankin, Inc. It demands an accounting of Sankin, Garfield and the two corporations and money judgments for such sums as an accounting might disclose as being owed by Sankin and Garfield to those two corporations.¹⁷

16. Both the answer of Pardo and the answer of the other four intervenor-defendants to plaintiffs' complaint set forth cross claims seeking additional relief against Garfield. Summary judgments on those cross claims were entered in favor of Garfield.

17. Garfield and Sankin, Inc. and Julius Sankin, Inc. filed no answers to the cross

claim against them. But at pre-trial (May 29, 1962), counsel for the two corporations stated that neither corporation would object to any accounting which the Court might order. All parties stipulated that such statement would constitute the answers of the two corporations.

[25] At no time has 5410 owned any stock in Garfield and Sankin, Inc. or Julius Sankin, Inc. Garfield could not sell or assign his stock in those corporations to 5410 or anyone else as long as Sankin's first purchase rights were in being. Within the time permitted Sankin exercised his rights. Since May 26, 1959 he has owned the Garfield stock. Thus no accounting is due 5410 as a stockholder.

[26] Nor can 5410 show itself to be a creditor or bear any other relation to Garfield and Sankin, Inc. or Julius Sankin, Inc., which might entitle it to an accounting as to the funds of those corporations by Sankin and Garfield. It is true that Benn has testified that the May 4, 1959 irrevocable assignment to him, acting for and on behalf of 5410, of all moneys due Garfield by the two corporations made 5410 a creditor. But that assertion is unsupportable for two reasons. First, as has already been found, Benn and Garfield together with 5410 perpetrated a fraud on Sankin and the purported irrevocable assignment was a spurious instrument serving as a means to that end. Secondly, assuming that that document was not conceived and born in fraud, the purported assignment was without consideration. All Benn-5410 gave to Garfield was three notes. Two notes for \$540,000.00 and \$60,000.00 were executed April 8, 1959. As provided in the stock purchase agreement, they evidenced the purported consideration for Garfield's 66⅔ shares of stock in Garfield and Sankin, Inc. The third note was in the amount of \$200,000.00 and made on April 21, 1959. It represented the purported purchase price of Garfield's 66⅔ shares of stock in Julius Sankin, Inc. as the stock purchase agreement for those shares provided. Not only do the stock purchase agreements and the three notes show that the \$800,000.00 was the purported purchase price of Garfield's stock and nothing more, but also Benn has admitted that fact in his verified answer to Garfield's cross claim against him and 5410.

(¶¶ 5, 8, Benn's Answer to Garfield's cross complaint.)

It was not until May 4, 1959 that Garfield executed the purported irrevocable assignment. It recited a ten dollars "and other good and valuable considerations" as being paid by Benn-5410. But the evidence shows that neither Benn nor 5410 paid even the ten dollars let alone furnished any "other good and valuable considerations." That the assignment, if it were valid, would be valuable can be appreciated from the claim asserted in this case by Garfield that at least \$190,000.00 is owed him by Garfield and Sankin, Inc.

5410 is neither a stockholder nor a creditor of either Garfield and Sankin, Inc. or Julius Sankin, Inc. And the record would support no other claim of 5410 to any legal or equitable interest in the funds or property of either corporation. In short, 5410 has made no showing for this Court to exercise its equitable jurisdiction to order an accounting.

[27, 28] But even if equitable jurisdiction did exist this Court would not order an accounting. 5410 has been found to be an active participant with Benn and Garfield in perpetrating a fraud on Sankin to deprive him of his first purchase rights. This Court would not aid and abet 5410 in that fraud by ordering Sankin to account. To do so would be to disregard the unclean hands doctrine. *Cochran v. Burdick*, 67 App.D.C. 87, 90, 89 F.2d 831, 834 (1937). And it would shut its doors to the accounting relief sought against Garfield even though he was 5410's partner in fraud. *Hopp v. Calloway*, 52 App.D.C. 3, 4-5, 280 F. 977, 978-979, (1922); *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381, rehearing denied, 325 U.S. 893, 65 S.Ct. 1189, 89 L.Ed. 2005 (1945). The parties need not have raised this barrier for the Court to apply it. *Brantley v. Skeens*, 105 U.S.App.D.C. 246, 251, 252, 266 F.2d 447, 452, 453 (1959).

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5410's counterclaim and cross claim will be dismissed.

IV *Garfield's cross claim against Benn and 5410*

By his cross claim against Benn and 5410, Garfield requests this Court (1) to direct a complete rescission of all transactions and uncompleted transfers which had been entered into and agreed to by Garfield, Benn-5410; (2), alternatively, to declare null and void all uncompleted transfers as well as all agreements between Garfield and Benn-5410; (3), as a second alternative, to declare Garfield to be the sole and legal stockholder of 5410, with the purported amendment to 5410's articles of incorporation increasing the stock to 250 shares declared null and void. Garfield also requests that Benn and 5410 be ordered to account for monies which they, or either of them, have diverted from Garfield and Sankin, Inc. and Julius Sankin, Inc. And finally Garfield seeks an order enjoining Benn and 5410 from enforcing or seeking to enforce any agreements, assignments or other documents executed by Garfield which purport to affect his interests in Garfield and Sankin, Inc. and Julius Sankin, Inc.

In contending that he is entitled to an order rescinding his agreements and transactions with Benn-5410, Garfield asserts that on May 21, 1959 he and Benn effected such a rescission. The record does not support that contention. On that date, Garfield and Benn engaged in a telephone conversation. Garfield testified that he called Benn "all kinds of names and asked him to return everything to its original state." But, according to Garfield, Benn stated, "I can't do that." For several days following that conversation counsel for Benn and counsel for Garfield discussed settlement. That agreement was never executed; in fact, negotiations by counsel terminated in acrimony. Thus without merit is Garfield's argument that, the parties having agreed to a rescission, the Court should declare it to be a fact pursuant to the maxim "equity regards as done that which ought to be done."

[29] Garfield by his own admission entered into the transactions and agreements with Benn-5410 with a fraudulent intent to accomplish a fraudulent end. Courts of equity do not grant relief to one who has so soiled his hands. This Court will not. *Hopp v. Calloway*, 52 App.D.C. 3, 4-5, 280 F. 977, 978-979 (1922), *Brantley v. Skeens*, 105 U.S.App. D.C. 246, 251, 266 F.2d 447, 452 (1959).

Garfield would extricate himself from this result by arguing that Benn-5410 is being unjustly enriched. Garfield cites *Hurwitz v. Hurwitz*, 78 U.S.App.D.C. 66, 136 F.2d 796, 148 A.L.R. 226 (1943) and *Wantulok v. Wantulok*, 67 Wyo. 22, 214 P.2d 477, 223 P.2d 1030, 21 A.L.R.2d 572 (1950). But Garfield is no innocent heir of a fraudulent grantor as in *Hurwitz*. He with Benn-5410 was an evil-doer.

Nor is Garfield like the plaintiff in *Wantulok* who sought to have the grantee of a conveyance declared trustee and to have him reconvey with title quieted in her. She and her deceased husband some thirteen years before the action was brought conveyed certain real estate to the husband's brother. They did so in the belief that their property was threatened with potential judgments arising out of medical and funeral bills incurred in connection with the last illness and death of an adult daughter. The grantors were of the view that they owed the money which was a doubtful conclusion. The grantee had agreed to reconvey the property at a future time. For eleven years the grantee made no claim to the property. During that period plaintiff paid all debts and expended sums improving the property. She and her husband were uneducated and little conversant with the laws. The husband was a coal miner and the plaintiff hired out as a cook to obtain the money to pay the deceased daughter's medical and funeral bills. As a witness her testimony had to be taken through an interpreter. The property conveyed which was valued at \$11,000.00 benefited from a \$2500.00 homestead exemption. The medical and funeral bills of the adult child totalled

\$1,000.00. No other debts were owed by plaintiff and her husband. The grantee was found to have given no consideration for the property. Under the entire circumstances of the case, the Wyoming Supreme Court held that the resulting unjust enrichment to the deceased husband's brother as grantee was a far more serious consequence in the eyes of equity than the clean hands maxim and it ordered the grantee to reconvey to the plaintiff.

Unlike Mrs. Wantulok, Garfield is an educated man, a law school graduate who has been admitted to the bar. While not engaged in the practice of law, he has been successful in business with extensive property holdings and has served as a chief executive of a gas distribution property. He knew Benn to be an unscrupulous man with whom he had prior unsatisfactory business dealings. Yet he deliberately contacted Benn for the purpose of seeking his assistance in depriving Sankin of the very rights Garfield contracted Sankin should have. He only sought legal advice after he discovered that Benn had defrauded him while aiding him in working a fraud on Sankin. And unlike Mrs. Wantulok who paid the bills which she probably did not owe, Garfield even after obtaining legal advice required Sankin to buy his stock at a fraudulently inflated price. It would take more than an interpreter for Mrs. Wantulok to recognize Garfield as kin of hers.

But even if Garfield and Mrs. Wantulok were in parallel positions, it would be difficult to conclude that Benn-5410 has been unjustly enriched. It has already been held here that the purported stock transfers by Garfield to Benn-5410 were ineffective. Sankin had until May 30, 1959 to exercise his right of first purchase; until that date Garfield was unable to transfer his stock to another. Sankin legally exercised his right and he has been the owner of the Garfield stock since May 26, 1959 when it was sold, assigned and transferred to him by Garfield. Garfield will be paid the reasonable value of that stock. The stock cer-

tificates are in the registry of this Court and an order will be entered delivering them to Sankin and directing Garfield to execute all necessary instruments in order that they may be cancelled and new certificates registered in the name of Sankin.

The other instrument of claimed value executed by Garfield was the purported irrevocable assignment of moneys owed Garfield by Garfield and Sankin, Inc. As has been stated that assignment, even if otherwise legal, was without consideration. It is difficult to see how that instrument, which bears none of the attributes of a negotiable instrument, could enrich 5410 and its stockholders whom-ever they might be. Certainly Garfield and Sankin, Inc. would not be justified in honoring it, particularly in light of the rulings made in this case.

Garfield asserts that he is the owner of the entire 100 shares of 5410's stock and that the April 28, 1959 amendment of that corporation's articles of incorporation increasing the capital stock to 250 shares was null and void. He claims that he not only subscribed for but actually purchased the entire issue of 100 shares of stock authorized by the original articles of incorporation and that, therefore, the purported amendment of the articles to increase the number of shares was null and void. In supporting his position he cites § 29-921h, D.C.Code (1961) which provides that, once there has been a subscription for shares, the articles may be amended only on an affirmative vote of two-thirds of the outstanding shares entitled to vote. He did not vote his shares nor did he authorize anyone to vote them on his behalf.

[30] While I find from the evidence that Garfield on April 20, 1959, paid Benn \$1,000.00 for the entire 100 shares of 5410 stock, 5410's minute book shows no action by the board of directors with respect to the subscription for that stock or purchase of it by Garfield. Thus it was within the letter of § 921g, D.C.Code (1961) for the original incorporators to amend the articles of incorporation to

provide for the issuance of 250 shares of 5410 stock and § 29-921h does not apply. No order will be entered declaring Garfield the sole owner of the shares of 5410.

Insofar as Garfield seeks a decree that he is the equitable owner of 5410's stock because of Benn's fraud, I leave him with Benn his compatriot in the land of fraud. He knew that 5410 was a "dummy" corporation created to defraud Sankin. While he paid \$1,000.00 for 100 shares of stock he allowed Benn to appear as the owner for the purpose of deceiving Sankin. He complains now because Benn outmaneuvered him. Let him stay where he placed himself.

[31] Nor will an order be entered directing Benn and 5410 to make an accounting for moneys diverted from Garfield and Sankin, Inc. and from Julius Sankin, Inc. Applying the clean hands maxim Garfield will be left where he placed himself—a participant with Benn-5410 in a fraud. It was Garfield who on April 21, 1959 advised Sankin he had sold his interest in the apartment project to Benn-5410. It was Garfield who told Sankin that the latter would thereafter have to deal with Benn. It was Garfield who resigned as a director and officer of each of the apartment corporations with the result that Benn took his place in the offices and on the board. Thus Benn as an officer and director was in a position to and did, through coercion and threats of receiverships, improperly gain the \$24,000.00 Garfield now complains about.

Garfield's cross claim against Benn and 5410 will be dismissed.

V. *Intervenor-Defendants' Cross Claim against Benn*

By their cross claim the intervenor-defendants seek, in light of the rulings made, to recover a judgment against Benn in the sums paid by them in their purported purchase of 5410 stock with

interest and the return of their notes marked cancelled, or, if those notes have been negotiated, a judgment equal to the amount of their notes.

[32] They assert that if Benn should be found guilty of fraud, as he has been, they were innocent of it. Their innocence, they say led them to purchase 5410's shares in the belief that it owned Garfield's stock in the apartment corporations and Garfield's credits. This Court has already found them to be not innocent and unwary but locked in a conspiracy with Benn to defraud Garfield. What they purchased, in the words of Betoff, was a "gift horse" in whose mouth one did not look. This Court leaves the intervenor-defendants with their purchase and their cross claim will be dismissed.

VI. *Benn's Cross Claim against Joseph Garfield, (Civil Action 1493-59)*

Benn's Complaint against Janet Garfield, (Civil Action 4002-60)

In his answer to Sankin's complaint in Civil Action 1493-59, Benn asserted a cross claim against Joseph Garfield through which he seeks to recover \$60,000.00 which he alleges was stolen from him by Garfield.

By his complaint filed in Civil Action 4002-60, Benn asserts a claim against Janet Garfield for \$60,000.00 which he alleges she stole from him.

On motion of Benn the cross claim and complaint were consolidated for trial.¹⁸

[33] I have heretofore found as a fact that Benn had had returned to him by Janet Garfield the entire sum of money which was in his brief case that she took on May 8, 1959. The credible evidence on which that finding is based shows that on May 5 or May 6, 1959,

the \$60,000.00. At trial Benn testified he could only remember the money and certain alleged promissory notes being in the brief case. Benn did not seek to amend his pleading to enlarge the issue. If he had, the evidence would not have justified such amendment.

18. The cross claim and complaint were limited to the recovery of \$60,000.00. The pre-trial order limits the issue to the recovery of that amount. That was the issue tried. In his brief Benn argues for recovery of damages for all of the contents of his brief case, including

Herman Mankes, while in Miami, informed Garfield that Benn had taken \$24,000.00 from the Garfield apartment enterprise. On May 7, Garfield called Benn, who was then in Washington, and charged him with taking the money. Benn denied the theft. Garfield also told his wife of what Mankes had advised him. Janet Garfield then called Benn and asked him to come to Florida.

On May 8, Benn arrived by plane about 2 p. m. Janet Garfield met Benn at the airport and the two of them drove in separate cars to Garfield's home in Coral Gables, both arriving at the same time. At the Garfield home, Benn was again charged with the theft which he denied. Benn, when asked by Garfield if he had brought with him Garfield's canceled checks, which, according to Garfield, evidenced his advances to the apartment enterprise, stated that they were in Washington. It was during this conversation that Benn and Janet Garfield revealed the affair in which they had been involved.

About 4 P. M. on May 8, Janet Garfield took Benn's brief case, which she believed contained Garfield's checks and files, and drove to her brother's home. While there, she was advised in a telephone conversation with Garfield, that Benn claimed there was \$200,000.00 in currency in the brief case. In disbelief, Janet Garfield looked into the brief case and found two Manila envelopes sealed with scotch tape. She tore the corner of one envelope and noted that it contained currency. She did not look into the other envelope but assumed it also contained currency in view of Benn's statement to her husband. She at no time ever removed the currency; in fact she never opened either envelope. She at no time counted the money and never knew the total amount. (Benn later asserted the money totalled \$120,000.00, \$60,000.00 in each envelope.) Janet Garfield, after secreting the brief case and its contents in her brother's home, returned to her own home about 11 P. M. Between that hour and 4 A. M. on May 9, Benn and the two Garfields entered

into extended discussion concerning the return of Benn's brief case to him and the return to Garfield by Benn of Garfield's papers as well as the \$24,000. The Garfields also demanded that Benn rescind the fraudulent transaction in which he and Garfield had been engaged.

Later in the morning of May 9 the three continued the discussion of the evening before. About 2 P. M. Benn called the Coral Gables police and charged the Garfields with robbing him. The police, after investigating the matter, took no action, leaving it instead to the parties to work out. The police, however, were forcibly removing Benn from the Garfield home until Janet Garfield prevailed upon them to let Benn return.

Following the departure of the police and further discussions, Benn offered to give Garfield a certificate for 100 shares of 5410 stock in order that Garfield might possess evidence of ownership of the corporation. Benn and Garfield went to a public stenographer at the Columbus Hotel and Janet Garfield drove to her brother's home where she picked up the brief case. She then took it to her own home and took out of it Garfield's papers and checks and one Manila envelope. After depositing that material in the attic of her home she drove to the Columbus Hotel to meet her husband and Benn. She took with her Benn's brief case and the remaining contents; that is the second Manila envelope and the papers which did not belong to Garfield. When Janet Garfield arrived at the hotel Benn had, or was in the process of endorsing a restricted certificate for 100 shares of 5410's stock to Garfield and having Garfield sign a letter to Riggs Bank. When Janet Garfield saw the letter she took it from Benn and tore it up so that it could not be mailed as she considered it a further instrument of Benn's fraud. At the hotel, she gave Benn his brief case and contents, including the one taped envelope.

Benn and the two Garfields then returned to the Garfield home where Benn made out a receipt to Janet Garfield for the returned brief case and its contents,

including \$120,000.00. At that time, Janet Garfield returned the second taped envelope. Thus Benn had returned to him by Janet Garfield the money for which he sues here; money which Garfield at no time had.

I reach this conclusion and make these findings on the credible evidence. I find Benn's testimony unworthy of being credited.

Benn testified that he was asked to travel to Florida on May 8, 1959 by Janet Garfield to help her and her husband who were being harrassed by Mankes; that when he arrived he was told that Mankes had advised Garfield that unless Benn signed the minutes of the annual meeting of Garfield and Sankin, Inc. and Julius Sankin, Inc. and the Federal corporation income tax returns for the year ending February 28, 1959, Mankes would work economic damage on his nephew Garfield. According to Benn he was unwilling to sign those documents without verification of large expenditures of corporate funds. And since he would not sign as an officer of the Garfield apartment corporation, Benn contends his brief case and contents were stolen from him. He admits that after he endorsed the May 9, 1959 restricted stock certificate for 100 shares of 5410 stock to Garfield, one envelope containing \$60,000.00 was returned to him. However, he claims that he has never had returned to him the remaining \$60,000.00 because of his continuous refusal to sign the minutes and tax returns. The receipt, which he acknowledges making to Janet Garfield, he claims was the result of his being coerced by the Garfields.

19. Benn stated to the Court that one Frederick Silver of New York City would be called by him to testify that on May 13, 1959, Janet Garfield called Silver and told him that she had Benn's \$60,000.00 and that she would return it when Benn delivered to her and her husband certain papers relating to an apartment building property in Washington, D. C. The trial of the consolidated Benn cross claim and complaint was held on December 22 and 23, 1964 and January 4 and 5, 1965. On December 22, Benn advised

The evidence of record shows Benn's contention to be incredible. Sankin testified that not only was Benn not asked to sign the corporations' minutes of the meetings of stockholders but that there were in fact no annual meetings held at any time from the organization date of the two corporations in May, 1958 to the date Sankin testified in this case. The by-laws of Garfield and Sankin, Inc. and Julius Sankin, Inc. provide that "[a]nual meetings of shareholders, commencing with the year 1959, shall be held on the second Tuesday of April, if not a legal holiday, and if a legal holiday, then on the next secular day following * * *." In the case of each corporation the minutes of an April 30, 1959 meeting of the board of directors show that the annual meeting of stockholders was set for June 19, 1959. This was done, according to Sankin, in order that such meetings would be held after his first purchase rights had expired. The April 30, 1959 minutes show that Benn was present at the board meeting of each corporation and that he signed those minutes.

Sankin also testified that Saunders, Benn's tax counsel as well as secretary-counsel for 5410, stated on or about May 7, 1959, that Benn would not sign the income tax returns for the corporate years ending February 28, 1959 because Benn knew nothing of the corporations' operations for that period. Being so advised the accountant for Garfield and Sankin, Inc. and Julius Sankin, Inc. obtained an extension of time for filing the returns. Thus on May 8, and May 9, 1959 when Benn was in Florida, there was no problem with respect to those returns.¹⁹

the Court that Silver would be available as a witness on December 23. Silver did not appear; his absence was not explained by Benn. When the trial was resumed on January 4, 1965, following the Christmas recess, Benn stated to the Court that Silver and his wife decided to take a West Indies cruise during the holidays; that Silver had had a heart attack recently; that Benn had talked to Silver over the telephone on January 1 while Silver's ship was docked in Nassau. Silver advised Benn, according

Joseph Garfield never having had any of Benn's claimed \$120,000.00 and Janet Garfield having returned it to Benn, the cross claim against Garfield and complaint against Janet Garfield will be dismissed.

VII Damages—Compensatory

Following the trial of the liability issues, the filing of briefs by counsel and parties and an oral statement by the Court as to how it intended to rule as to liability, an order of reference to a Special Master was entered herein. That order submitted to the Special Master the issue of all damages, except punitive damages, attorneys fees and costs, suffered by the plaintiff as a result of the frauds of Garfield, Benn and 5410, including a determination of the reasonable value as of May 26, 1959 of Garfield's 66⅔ shares of stock in Garfield and Sankin, Inc. and his 66⅔ shares of stock in Julius Sankin, Inc., as well as an accounting for any monies or other assets of Garfield and Sankin, Inc. and Julius Sankin, Inc. which had come into the possession of any of the defendants, including intervenor defendants Pardo, Whiting, Betoff, Winn and Link, now deceased but represented here by his executrix.

Having concluded that the issue of damages, particularly the determination

to the latter, that his ship would dock in New York before noon January 4 and that he would come to Washington to testify unless it was physically impossible for him to do so, in which event he would give his deposition. Benn was advised by the Court that if Silver appeared on January 5, he could be heard but that the trial would not be continued to permit the taking of the deposition. The Court was then advised that Benn had another witness whom he might not call if Silver appeared. On January 5 Benn advised the Court that Silver could not appear because of his health. But Benn did not call the other witness he stated he would be calling if Silver did not appear. January 5, 1965 being the last day of the trial on the liability issue, which had been proceeding daily since October 19, 1964, the Court refused to continue the trial for Benn to take Silver's deposition.

of the reasonable value of Garfield's capital stock in the two corporations as of May 26, 1959, was a complicated and difficult matter, the Court appointed, pursuant to Rule 53, Federal Rules of Civil Procedure, William J. Durkin, a member of the bar of this Court and a certified public accountant, as Special Master. He conducted hearings for a period of twenty-two days which resulted in over 2000 pages of transcript. Following the filing of briefs and argument of counsel, the Special Master prepared and filed with the Clerk of this Court on July 7, 1967, his report, findings of fact and conclusions of law. Thereafter plaintiff Sankin and defendants Garfield, 5410, Benn and Pardo served and filed their written objections together with their motions based on those objections. A hearing was held by the Court with respect to those objections and motions.

The Court having considered the Special Master's report, findings of fact and conclusions of law and the objections filed thereto, as well as argument of counsel, adopts the report, findings of fact and conclusions of law, except as hereinafter noted.

[34, 35] Of the objections filed but a few need be mentioned. Sankin objected to the Special Master's finding that the reasonable value of Garfield's stock pur-

Benn could not have been surprised in December 1964 and January 1965 as to Janet Garfield's testimony that she returned the entire \$120,000.00 to Benn on May 9, 1959. In civil action 4002-60 her deposition was taken on December 28, 1961 at which time she testified, as she did at the trial, as to her taking the brief case and thereafter returning it with one envelope of money to Benn at the Columbus Hotel and at her home returning the second envelope, at which time Benn gave her a receipt. Benn had plenty of time to take Silver's deposition between December 28, 1961 and December 22, 1964. And in that connection it is to be noted that to assure himself of the claimed Silver testimony Benn should have done so since this Court's subpoena would not have reached Silver in New York.

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chased by Sankin was \$376,479.00 on May 26, 1959. In part this value was arrived at by the Special Master capitalizing the income of the Garfield Apartments. Sankin, in objecting to the results of the Special Master's computation of the reasonable value of the equity in the apartment building, contended that the outer and upper limit of such value was the reproduction cost of the building. An examination of the report shows that the Special Master considered and rejected the reproduction cost method. His application of the capitalization method is supported by the evidence. Moreover, only if the Special Master's report was clearly erroneous should it be set aside. It was not. Rule 53(e), F. Rules of Civ.P., Dyker Building Co. v. United States, 86 U.S.App.D.C. 297, 299, 182 F.2d 85, 87 (1950); Hepner v. Chozick, 111 U.S.App.D.C. 338, 339, 296 F.2d 595, 596 (1961).

[36] Sankin also complained of the Special Master capitalizing the apartment house income at 7.21%. But again the record supports this finding by the Special Master. It will not be set aside.

[37] Sankin also objected to the Special Master's finding and conclusion that in determining the reasonable value of the Garfield stock that value should not be discounted because of the voting and transfer restrictions. The Special Master stated that those limitations would definitely be factors for consideration if the sale was made to a third party who did not already own the other one-third

interest in the capital stock as did Sankin on May 26, 1959. An examination of the record shows that Sankin himself testified on this subject as did Arthur M. Chaite. But their testimony is neither conclusive nor persuasive that a discount should apply in this instance. There being no other testimony in the record as to what would be the rate of discount, if one were to be applied, it would be pure conjecture to discount the value of Garfield's stock in any amount. The Special Master's conclusions not to discount the value of the Garfield stock will not be disturbed.

Sankin's other objections do not merit discussion.²⁰

Garfield also objected to the Special Master's valuation of the apartment house property. Garfield contended that the value placed upon property by the Special Master is too low. But as stated before, there is evidence to sustain the Special Master's finding. Not being erroneous it will not be disturbed.

[38] In computing the valuation of the stock of Garfield and Sankin, Inc. the Special Master found that corporation's promissory note of May 1, 1958, in the amount of \$73,062.00 with interest at 5% per annum made payable to Garfield and Sankin individually was properly includible in the liabilities of Garfield and Sankin, Inc. Garfield objected to that finding on the grounds that (1) the note is non-negotiable; (2) it need not be paid in part or in full until May 1, 1999; (3) interest, which can only be

20. On page 28 of the Special Master's Findings of Fact and Conclusions of Law he treats with certain of Sankin's claims for compensatory damages. In discussing *Schlein v. Smith*, 82 U.S.App.D.C. 42, 160 F.2d 22 (1947), he stated that the plaintiff there was an ignorant woman upon whom a gross fraud had been perpetrated and the Special Master then added that this Court in this case has stated that: "There were no unwary and innocent in this case", citing pages 6054-6063 of the transcript. A reading of the first paragraph of page 6054 makes clear that the quoted sentence was used only in connection with the Court's find-

ing that all parties to this action were aware of the restrictions on the voting rights of the Garfield and Sankin, Inc. stock and the Julius Sankin, Inc. stock. As the rest of the Court's oral statement (Tr. 6054-6063) makes known, and as has been more fully set forth in this opinion, it was found that Sankin was an innocent victim of the fraud perpetrated by Garfield, Benn-5410. In all other respects the Special Master's Findings of Fact and Conclusions of Law respecting Sankin's Claim for compensatory damages are adopted. (pp. 27-29, Special Master's Report, Findings of Fact and Conclusions of Law.)

paid out of cash surplus, can be deferred until May 1, 1999; (4) the note cannot be accelerated even if the apartment house project is refinanced with conventional financing; and (5) the note is not secured. But the record shows the note was made by Garfield and Sankin, Inc. and signed by Garfield as president. It is obviously a liability of the corporation and was properly included as such by the Special Master.

Nor is there any basis for modifying the Special Master's finding that no interest is to be paid by Sankin to Garfield by reason of Sankin's May 26, 1959 purchase of Garfield stock.

Except in so far as Benn's objections go to the Special Master's finding of his indebtedness to Garfield in the sum of \$23,839.42, his objections and those of 5410 and Pardo are without merit and deserve no discussion.

The Special Master found Benn to be indebted to Garfield in the sum of \$23,839.42. This resulted from Benn taking from Garfield and Sankin, Inc. the sum of \$24,000.00 on April 24, 1959 without right. From that amount the Special Master deducted \$158.03, the cash balance in 5410's checking account in The Riggs National Bank. In stating that account the Special Master was acting pursuant to the order of reference. By that order there was submitted to the Special Master the issue of all damages, excluding punitive damages, attorneys' fees and costs, suffered by Garfield as a result of the frauds of Benn, 5410 and the five intervenor-defendants. That submission was in keeping with this Court's oral statement of July 26, 1965 that it intended to rule that 5410's stock ownership would be in Garfield and that the damage issue of Garfield's claim against Benn and 5410 for \$24,000.00 would be submitted to the Special Master.

On reflection I have concluded that to rule that Garfield was the owner of 5410's stock and to award damages against Benn and 5410 would be in error. As hereinbefore stated at length in part IV of this opinion, Garfield's cross

claim against Benn and 5410 will be dismissed because to grant it would violate the clean hands maxim. It was by that cross claim that Garfield sought to have this Court declare him to be the owner of the stock of 5410 and to recover the \$24,000.00 taken by Benn from the funds of Garfield and Sankin, Inc.

[39] The Garfield cross claim being dismissed, the Special Master's report, findings of fact and conclusions will be modified by rejecting that part of the report appearing on pages 29 and 30 which deals with Garfield's cross claim against Benn and 5410 and by rejecting paragraph 18 of the summary of findings and conclusions which appears on page 32 of the report. In all other respects the Special Master's report and recommendations are approved and the findings of fact and conclusions contained in the report are adopted as those of this Court and are by this reference made a part of this opinion.

Having approved and adopted the Special Master's report, findings and conclusions, as modified, Sankin will be awarded compensatory damages against Garfield in the amount of \$423,521.00, which amount shall abate his liability for the payment of \$800,000.00 as evidenced by his non-interest bearing notes to Garfield; that upon payment into the Registry of this Court of the abated balance of \$376,479.00, Sankin will have satisfied in full his liability to Garfield on account of Sankin's purchase of Garfield's 66⅔ shares of stock of Garfield and Sankin, Inc. and 66⅔ shares of stock of Julius Sankin, Inc.; that upon the payment of said \$376,479.00 into the Registry of this Court, the Clerk of the Court will deliver to Sankin the stock certificates representing such shares now in the Registry of the Court.

The judgment of this Court will also require Garfield to deposit in the Registry of the Court the three promissory notes made by Sankin to Garfield on May 26, 1959 in the total amount of \$800,000.00. The Clerk of the Court when delivering the stock certificates to San-

kin will also deliver those three notes to him.

[40] While the \$423,521.00 awarded Sankin against Garfield compensates him for his pecuniary loss, Sankin's legal rights were also technically violated by the agreement with Garfield and Sankin. For those violations Benn and 5410 are each assessed \$1.00 nominal damages in favor of Sankin. *Chesapeake & Potomac Tel. Co. v. Clay*, 90 U.S.App. D.C. 206, 208, 194 F.2d 888, 890 (1952).

At the time this action was filed The Riggs National Bank was made a party defendant for the reason that it, as escrow agent, was holding Garfield's 66⅔ shares of stock of Garfield and Sankin, Inc., and 66⅔ shares of stock of Julius Sankin, Inc. A July 19, 1959 order of this Court dismissed with prejudice this action against the Bank and it provided that the stock the Bank held should be deposited into the Registry of this Court and thereafter the Bank would be discharged from all further liability to any of the parties to the action on account of or by reason of the escrow agreements. By a further provision of that order, this Court retained jurisdiction to consider, fix and award to The Riggs National Bank, its attorneys' fees and reasonable expenses on account of its conduct as escrow agent.

On March 14, 1960 another order was entered by this Court allowing The Riggs National Bank attorneys' fees in the amount of \$3,500.00. That order provided that the Bank should have a lien against the Garfield stock certificates and that until the attorneys' fees were paid the stock certificates were not to be discharged from the Registry of the Court. The final determination as to which of the parties to the action should be responsible for the payment of the \$3,500.00 attorneys' fees to the Bank was to await a final determination by this Court of this action.

As has been stated hereinbefore, there were two escrow agreements which are involved in this case. The first escrow

agreement was entered into on April 8, 1959. The parties were Garfield, 5410 Connecticut Avenue Corporation, a then non-existing corporation for which Benn signed as "President Pro-tem", and the escrow agent, The Riggs National Bank. By that agreement Garfield deposited in Garfield and Sankin, Inc. and the then existing 5410 deposited with the Bank two nonnegotiable promissory notes totaling \$600,000.00.

The second escrow agreement is dated April 21, 1959. The parties were the same as named in the April 8 agreement, except that in the interim 5410 was incorporated, although Benn still signed as "President Pro-tem." By the terms of the April 21, agreement Garfield deposited with the Bank his 66⅔ shares of stock in Julius Sankin, Inc. and 5410 deposited with the Bank one nonnegotiable promissory note in the face amount of \$200,000.00.

[41] In the case of both agreements Garfield and Benn-5410 agreed to indemnify the Bank against all expenses to which it might be put as a result of consulting with counsel of its own choice in connection with the escrow agreements. In view of their express promises to indemnify the Bank for attorneys' fees, Garfield, Benn and 5410 are obligated to pay the \$3,500.00 attorneys' fees allowed the Bank by this Court's March 14, 1960 order. A judgment to that effect will be entered herein.

However, the entry of such a judgment will not remove the lien impressed on the stock certificates in the Registry of the Court. And the March 14, 1960 order of this Court impressing that lien provides that the stock certificates shall not be discharged from the registry of the Court until the \$3,500.00 has been paid to The Riggs National Bank. But as has been determined, Sankin is entitled to those stock certificates upon his depositing in the Registry of this Court \$376,479.00 and he is entitled to that stock free of all liens. Therefore, if, within 10 days after the entry herein of the Court's

final order, judgment and decree, The Riggs National Bank has not filed with the Registry of the Court its receipt showing payment to it of \$3,500.00, the Clerk of this Court shall pay from the \$376,479.00 deposited by Sankin \$3,500.00 to the Bank and take its receipt therefor. In such an event Garfield may pursue whatever rights he might have against Benn and 5410.

VIII *Punitive Damages, Attorneys' Fees, Costs*

In addition to compensatory damages Sankin seeks punitive damages. It has been said by the Supreme Court that " * * * the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiffs' injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." *Lake Shore, etc. Railway Co. v. Prentice*, 147 U.S. 101, 107, 13 S.Ct. 261, 263, 37 L.Ed. 97 (1893). And the Court of Appeals for this Circuit has stated: "That punitive damages have a proper place in a civil case as a punishment of, and as a deterrent to, various forms of wrongful behavior has long been recognized by the federal courts including this court." *Brown v. Coates*, 102 U.S.App.D.C. 300, 303, 253 F.2d 36, 39, 67 A.L.R.2d 943 (1958).

[42] The conduct of Garfield and Benn-5410 as hereinbefore recited makes apposite here the long since spoken words of Justice Story: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse." *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558, 4 L.Ed. 456 (1818). The actual malice of Garfield and Benn-

5410 makes this an appropriate case to award punitive damages.

[43] As an element of such damages, Sankin seeks an allowance for attorneys' fees. In circumstances such as exist here, it is proper to award counsel fees as punitive damages. *Schlein v. Smith*, 82 U.S.App.D.C. 42, 45, 160 F.2d 22, 25 (1947), *Afro-American Publishing Co. v. Jaffe*, 125 U.S.App.D.C. 70, 83, 366 F.2d 649, 662 (1966). However, Sankin has disclaimed any intent to seek attorneys' fees in the form of punitive damages from Garfield. He acknowledges that he has settled with Garfield with respect to attorneys' fees.²¹ But he contends that such settlement did not release anyone else.

The settlement with Garfield was a result of the May 26, 1959 indemnity agreement and a 1960 memorandum of understanding between Sankin and Garfield. As stated hereinbefore when Sankin purchased Garfield's stock on May 26, 1959 for \$800,000.00 he, of course, knew that Garfield claimed to be the owner. However, he was also aware of Benn's adverse claim. Indeed Benn had advised Sankin that the latter could only purchase the stock from Benn. Thus with Garfield and Benn each claiming to own the stock and with the time running out in which Sankin could exercise his first right of purchase, he did the prudent thing on May 26 and required an indemnity agreement from Garfield. That agreement, among other things, provided that Garfield would indemnify and hold harmless Sankin from and against all damages, loss, costs and expenses arising out of any claim, demand, action or cause of action asserted against Sankin as a result of any and all transactions between Garfield and Benn or 5410 relating to the sale by Garfield of his stock to 5410, or relating to Sankin's purchase of the stock from Garfield.

21. In his reply to the memoranda of Benn and Garfield opposing Sankin's motions for punitive damages, attorneys' fees and costs Sankin stated: "it was not intended that the Plaintiff's Motion for Attor-

ney's Fees would apply to Garfield. It is quite clear that Mr. Sankin entered into a settlement agreement with Mr. Garfield which is an exhibit in this case as Interveners (sic) Exhibit 10."

As a result of differences concerning the proper interpretation of the May 26, 1959 indemnity agreement, Garfield and Sankin on October 19, 1960 entered into a memorandum of understanding as to their respective rights and obligations. Pursuant to the agreement as interpreted by the memorandum, Garfield has paid over \$20,000.00 on behalf of Sankin's attorneys' fees and costs.

Sankin has disclaimed any intent to secure further attorneys' fees from Garfield either under their agreement or by way of punitive damages. But an affidavit of Sankin's counsel, Edward L. Genn, shows the total of fees chargeable to Sankin to be \$117,300.00. Counsel for Benn in answer to Sankin's motion for an award of attorneys' fees state that Benn "does not challenge . . . that able counsel for the plaintiff is not entitled to the fee he claims." Rather Benn argues that "the Court should let the parties pick up their own pieces, and pay their own expenses." But in this case the pieces to be picked up were strewn about by Benn's fraud as well as Garfield's. And the expenses incurred by Sankin resulted from the fraud of both. However, Benn contends that to award through punitive damages an additional sum for attorneys' fees against him but not Garfield would be to apportion punitive damages; and that punitive damages may not be apportioned.

There is a division among the several jurisdictions which have ruled on the matter of apportioning exemplary damages where more than one defendant has been found guilty of malicious action in committing a tort. Some courts permit the awarding of such damage against one or more tort feasons and not against another. Other Courts hold that there can be no such apportionment where several defendants are sued jointly. See 62 A.L.R. 239; 9 A.L.R.3d 695-702; 22 Am.Jur.2d, Damages, § 262, pp. 356-357. No case of this Court or of the Court of Appeals for this Circuit which deals with this subject has been brought to my attention and I have found none. However, the Supreme Court in a case arising

held that the financial worth of one of three defendants was inadmissible where the libeled plaintiff sought both compensatory and punitive damages. In that case the Court reversed as to two defendants and remanded for a new trial as to the remaining defendant. And while the question of whether punitive damages could be apportioned was not directly before the Court, the opinion indicates that they could not be. *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 551-554, 19 S.Ct. 296, 43 L.Ed. 543 (1899).

[44] No judgment will be entered in favor of Sankin and against Benn and 5410 for attorneys' fees in the form of punitive damages since none can be awarded against Garfield in view of his settlement with Sankin in March 1960. Sankin's motion for attorneys' fees will be denied.

[45, 46] However, to refuse to grant attorneys' fees is not to reject Sankin's prayer for punitive damages. As has been indicated throughout this opinion, the conduct of Garfield, Benn and 5410 has been unconscionable. It deserves punishment; such conduct must be deterred. With an intent to accomplish those purposes I will award \$30,000.00 punitive damages in favor of Sankin and against Garfield, Benn and 5410. There can be no doubt that punitive damages may be assessed against 5410 Connecticut Avenue Corporation. At the time of its grossly fraudulent conduct, along with that of Garfield and Benn, the latter as its president and only stockholder, was "actually wielding the whole executive power" of 5410. Benn was thus so far representing the corporation and identified with it, that his wanton, malicious and oppressive intent, in doing the fraudulent acts in behalf of the corporation as well as of himself, is to be treated as the intent of the corporation itself. *Lake Shore, etc. Railway Co. v. Prentice*, 147 U.S. 101, 114, 13 S.Ct. 261, 37 L.Ed. 97 (1893).

[47] Sankin's motion and prayer for punitive damages are granted in the sum

of \$30,000.00 against defendants Garfield, Benn and 5410.

[48] A third motion before the Court is Sankin's motion for costs and fees. This motion is premature. It sets forth certain amounts Sankin asserts he was obligated to pay. The motion purportedly supports in part some of those expenditures. However, it seeks a judgment for " * * * such further costs as may have been or may hereafter be incurred * * *."

Also Sankin's motion for costs includes the \$3,500.00 attorneys' fees awarded The Riggs National Bank on March 14, 1960. With those fees I have already dealt.

Sankin's motion for costs and fees will be denied without prejudice. At the appropriate time the matter of costs will be acted upon. See Rule 54(d), F.R.Civ. P., *Perlman v. Feldmann*, 116 F.Supp. 102, 111 (D.Conn.1953); *Hansen v. Bradley*, 114 F.Supp. 382, 387 (D.Md. 1953); *Syracuse Broadcasting Corporation v. Newhouse*, 32 F.R.D. 29 (N.D. N.Y. 1963). See also *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964); *Association of Western Railways v. Riss and Company*, 116 U.S.App.D.C. 63, 320 F.2d 785 (1963).

IX *Permanent Injunction*

[49] Sankin in filing this action also sought injunctive relief. A preliminary injunction was entered on June 8, 1959, by the terms of which the defendants and all persons²² in active concert with them were restrained from selling, transferring, pledging, disposing of, registering on the records of Garfield and Sankin, Inc. and Julius Sankin, Inc. or affecting in any way or manner the 66 $\frac{2}{3}$ shares of stock in Julius Sankin, Inc. and 66 $\frac{2}{3}$ shares of stock in Julius Sankin, Inc. which Sankin had purchased from Garfield on May 26, 1959. That preliminary injunction has continued in effect since it was issued.

22. At the time the preliminary injunction was issued Benn had been named as

This case having now been tried on its merits and this Court having decided it as set forth in this opinion, a permanent injunction will be made a part of the final judgment and decree. That injunction will not only permanently continue the restraints of the preliminary injunction, but it will also enjoin the defendants and all persons acting in concert with them from in any way interfering with or making claim to any interest in Garfield and Sankin, Inc. and Julius Sankin, Inc.



SULPHUR TERMINALS COMPANY, Inc.

v.

FELICAN MARINE CARRIERS, INC. and the SS LOUISIANA BRIMSTONE

Civ. A. No. 68-45.

United States District Court
E. D. Louisiana,
New Orleans Division.

March 1, 1968.

Suit by wharf owner against vessel and against managing agent and operator of the vessel to recover for docking damage done to piling cluster and wharf walkway. The District Court, Mitchell, J., held, inter alia, that presumption of negligence of defendant vessel, arising from fact that the vessel while docking struck and damaged piling cluster and wharf walkway, was not rebutted by testimony of master, pilot, and various members of vessel's crew to the effect that they simply did not remember anything particular about the docking itself and thus concluded that it had been a normal one.

Judgment accordingly.

a defendant but the summons and complaint had not been served upon him.

United States District Court
for the District of Columbia
Washington, D. C. 20001

Chambers of
William B. Jones
United States District Judge

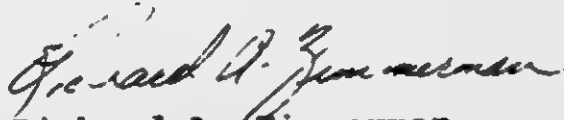
January 24, 1968

MEMORANDUM TO: COUNSEL

RE: CIVIL ACTIONS 1493-59 and 4002-60

Subsequent to the dissemination of the Court's opinion in Sankin v. 5410 Connecticut Avenue Corporation, et al., Civil Action 1493-59 and Benn v. Garfield, Civil Action 4002-60, a few typographical errors were discovered. The following is a list of these errors and the corrections which have been made in the original opinion filed in the above consolidated cases:

1. P.33 - line 11, "to take" should be "taking"
2. P.33 - footnote 5, line 5, after "referred"
add "to"
3. P.34 - line 24, "from those arguments" should
be "from those agreements"
4. P.37 - line 21, eliminate "honestly"
5. P.38 - line 2, "200" should be "2000"
6. P. 46- line 24, insert quotation marks before * * *
7. P.47 - line 9, insert a period and quotation marks
after * * *
8. P.59 - line 24, "1959" should be "1958"
9. P.62 - line 27, "o first offer" should be
"to first offer"
10. P.84 - line 3, "fro" should be "for"


Richard A. Zimmerman
Law Clerk to Judge Jones

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANKIN

v.

5410 CONNECTICUT AVENUE
CORPORATION, ET AL.

BENN

v.

GARFIELD

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Civil Action No. 1493-59

Civil Action No. 4002-60

MEMORANDUM

In this action the issue of damages, except punitive damages, attorneys' fees and costs, was submitted to a Special Master pursuant to Rule 53, Federal Rules of Civil Procedure. That issue was a complicated and difficult one, including among other things the determination of the reasonable value as of May 26, 1959, of defendant Garfield's capital stock holdings in Garfield and Sankin, Inc. and Julius Sankin, Inc. Since that determination of that issue required evidentiary hearings, the Special Master had to be a person well versed in the law as well as having both knowledge and experience in the related fields of accounting and corporate finance. William J. Durkin, a member of the bar of this Court and a certified public accountant of wide experience, was selected as the Special Master.

After conducting extensive hearings and thereafter making and filing his Report, Findings of Fact and Conclusions of Law, Mr. Durkin filed his verified Report of Expenses and Petition for Compensation in Master's Hearing. Only the plaintiff responded to that Report and Petition and he took no exception to it. He only contended that the fees and expenses awarded

the Special Master should be assessed against the defendants and not the plaintiff.

The Special Master's verified Report of Expenses and Petition for Compensation sets forth in detail the expenses incurred by him and the time and effort devoted by him in the performance of his duties. I have examined that Report and Petition. Both the expenses incurred and the fee requested are reasonable.

As the verified Report and Petition show the Special Master received deposits totaling \$4000.00.^{1/} The expenses incurred totaled \$3165.62, of which \$2954.70 was expended for services of a reporter and copies of transcripts of the hearings before the Special Master. A balance of \$834.38 remains.

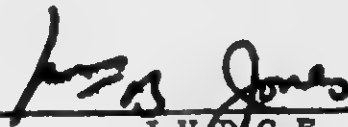
The Special Master conducted twenty-two days of hearings. There were 2,029 pages of transcript and 110 exhibits. In addition the Special Master heard and ruled on motions related to the damage issue, engaged in legal research, reviewed the record made before him and the record made before the Court on the liability issue, prepared preliminary findings of fact and conclusions of law and, after considering and acting upon objections to his preliminary findings and conclusions, prepared final findings of fact and conclusions of law. The total time devoted by the Special Master to the damage issue was 435 hours. He requests that he be compensated in the sum of \$21,750.00 based on a rate of \$50.00 per hour.

^{1/} Five of the parties made deposits with the Special Master. The plaintiff and defendants Garfield and Benn each deposited \$1000.00. Defendant 5410 Connecticut Avenue Corporation and intervenor-defendant Pardo made deposits of \$500.00 each.

The Special Master is well entitled to the compensation he claims. The complicated damage issue required the extensive hearings. The difficult legal and accounting questions could only be answered after extensive and careful research, study and consideration. The Special Master's Report, Findings of Fact and Conclusions of Law evidence the excellent service he rendered in this case. I have adopted that report and those findings and conclusions except in one respect. As the opinion I am filing in this case shows, the one instance where I rejected the report, findings and conclusions was through no fault of the Special Master. When I referred the damage issue to him I included a claim asserted by Joseph Garfield against 5410 Connecticut Avenue Corporation and James T. Benn for an accounting for monies taken by them. The Special Master stated such an account in his report, findings and conclusions. On reflection I have concluded that Garfield is not entitled to such relief because of the fraud which he, Benn and 5410 Connecticut Avenue Corporation perpetrated on the plaintiff. If Garfield had not participated in that fraud he would not have had a claim for an accounting as he would not have suffered the loss of his monies. To grant him the accounting relief he seeks would violate the equitable clean hands doctrine. It was for that reason I rejected the Special Master's accounting, finding and conclusion which I had ordered him to make.

I will allow the Special Master \$21,750.00 as compensation. That award shall be assessed against all the defendants and intervenor-defendants. The \$834.38 balance remaining after

the expenses incurred were deducted from the \$4000.00 deposits shall be retained by the Special Master as a credit on the \$21,750.00 fee.^{2/} The balance of \$20,915.62 shall be paid to the Special Master by the Clerk of the Court out of the funds to be deposited by the plaintiff in the Registry of the Court, which payment by the plaintiff is particularly dealt with in the Court's opinion filed in this case. Whatever rights Garfield may have for contribution from the other defendants and intervenor-defendants toward the payment of the Special Master's compensation, he may assert in such manner as he sees fit. It was after all Garfield who initiated the action that resulted in the frauds found in this case.


J U D G E

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Attorney for Defendant James T. Benn

^{2/} Such right as the plaintiff may have to a return of the \$1000.00 deposited by him will be considered in connection with a motion for costs which he may hereafter file.

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and Janet Garfield

John A. Beck, Esq.
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Link, Executrix of the Estate of
Harry W. Link

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN

v.

5410 CONNECTICUT AVENUE
CORPORATION, et al.

JAMES T. BENN

v.

JOSEPH A. GARFIELD

JANET GARFIELD

Civil Action No. 1493-59


Civil Action No. 4002-60

MOTION FOR NEW TRIAL, TO AMEND THE JUDGMENT,
AND FOR OTHER RELIEF

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, Defendant James T. Benn moves the Court to grant him a new trial on all or part of the issues in this action, to amend the judgment and to grant such other relief, as the Court shall deem appropriate on the grounds set forth in the Memorandum in Support filed herewith.

WHEREFORE, it is prayed that the motion be granted.


WILLIAM H. DUCK


JOHN GLANDON DAVIES
Attorneys for Defendant Benn
538 Pennsylvania Building
Washington, D. C.
393-6877

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion and the memorandum in support thereof was mailed to counsel of record and pro se parties this 29th day of January, 1968.


JOHN GLANDON DAVIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN)

v.)

Civil Action No. 1493-59

5410 CONNECTICUT AVENUE)
CORPORATION ET AL.

JAMES T. BENN)

v.)

Civil Action No. 4002-60

JOSEPH A. GARFIELD)

JANET GARFIELD)

MEMORANDUM IN SUPPORT OF DEFENDANT JAMES T. BENN'S
MOTION FOR NEW TRIAL, TO AMEND THE JUDGMENT, AND
FOR OTHER RELIEF

The Opinion of the Court was filed herein and judgment entered on January 18, 1968. The defendant James T. Benn by this Motion would respectfully bring to the attention of the Court certain matters which this defendant believes should induce the Court to exercise its powers under Rule 59 to grant a new trial on all or part of the issues, to open the judgment, to take additional testimony, to amend findings of fact and conclusions of law or make new findings and conclusions to alter or amend the judgment and direct the entry of a new judgment, as the Court deems appropriate in the exercise of its equity jurisdiction.

The intent of this Memorandum is to acquaint the Court with evidence obtained since trial tending to show, contrary to the findings of the Court in its Opinion, (1) that Janet Garfield is not a credible witness, (2) that the unreturned

\$60,000 involved in Civil /Action No. 4002-60 was not returned to Benn on May 9, 1959, and (3) that the International Timber Corporation stock was of some considerable value in excess of \$10,000.

A. Janet Garfield's Credibility.

This Court has found that "according to the evidence in this case those three (Garfield, Janet Garfield and Benn) are the only persons in a position to know whether it was with fraudulent motivation that they planned and acted." Opinion p. 36. On the evidence before it, the Court has determined that Garfield is worthy of belief and that Benn is not. This finding by the Court is made independent of the weight of Janet Garfield's testimony, but the Court does state that if there were any doubt "...whether (it) should credit Benn's testimony or that of Garfield's (it) would be compelled to resolve that doubt against Benn in view of the credence (it) places in Janet Garfield's testimony which is in direct conflict with Benn's." Opinion p. 38.

Thus, it would appear that Janet Garfield's credibility has a considerable bearing on the Court's findings herein and if questioned, should induce the Court to re-examine its findings.

There are attached hereto the following five (5) exhibits:

(1) A statement of Janet Garfield in the form of an affidavit dated sometime in June 1967 which contradicts much of her testimony on which the Court relies, the details of which are discussed infra.

(2) The affidavit of Charles A. Appel, Jr., a renowned handwriting expert, establishing the authenticity of the signature of Janet Garfield on the statement.

(3) The affidavit of Louis Vernell, a member of the Florida Bar, supporting the truth of Janet Garfield's statement.

(4) The affidavit of William B. Roman also a member of the Florida Bar, reciting how Benn established contact with Janet Garfield with a view to obtaining her statement; and

(5) The affidavit of James T. Benn relating further circumstances regarding Janet Garfield's statement.

This defendant submits that the total effect of these affidavits, three (3) of which serve primarily to authenticate and verify the Janet Garfield statement, is to seriously undermine the credibility of Janet Garfield's testimony in this case.

Janet Garfield's statement begins with general recitals identifying her as a party in these consolidated actions and stating further that the testimony given by her as a witness was not fully in accord with all the facts then known, was sometimes erroneous and sometimes incomplete. She states further that some of the incomplete testimony was given under the influence of her husband and in furtherance of his scheme to oust and force James T. Benn out of the transaction and out of 5410 Corporation. Statement of Janet Garfield, Page 1, unnumbered paragraphs 1 thru 4. In these general recitals she further states that her health is poor and that the possibility of having given incomplete and inaccurate testimony has caused her great

concern to a point where she is anxious to set the record straight.

The specific items of her testimony which she is anxious to revise are set forth in numbered paragraphs 1 through 8 in her statement. She begins in paragraph no. 1 by stating that as a result of the May 6-7, 1959, meeting in Miami between Joseph Garfield and Herman Mankes, Garfield decided to repudiate his transaction with Benn. This is in accord with the findings of the Court, but she proceeds further to state that this meeting influenced Garfield to aid Sankin in ousting Benn from the transaction and also prompted Sankin's request of 5410 Corporation to extend his purchase option through May 30, 1959. These additional facts, though not generally departing from the Court's findings, clearly establish the idea of a scheme developing between Sankin and Garfield, against Benn, at the suggestion of Mankes.

In paragraph No. 2, Janet Garfield makes a statement directly contrary to her testimony before the Court in regard to the \$1,000 check made out to Cash delivered by Garfield to Benn. Her testimony was that this was payment for the initial subscription to the stock of 5410 Corporation. In her statement she now says that the check was in fact cashed by Benn for currency which her husband needed. Though the Court has found for other reasons that Garfield is not to be adjudged the owner of 5410 Corporation thereby rendering the \$1,000 check issue moot in some respects, the effect of this change in testimony has a direct bearing on credibility.

Paragraph No. 3 sets forth that the file concerning the International Timber Corporation was turned over to Garfield on or about April 26, 1959. This is directly contrary to the finding of the Court that Garfield never heard about the International Timber Corporation prior to May 4, 1959. If this latest statement is correct Garfield had the file in his possession from April 26 and therefore had ample opportunity to investigate and determine the value of the Surinam timber concessions owned by International Timber Corporation.

In paragraph no. 4 Mrs. Garfield alludes to a fact which is central to this case. The Court has found that Benn had actual notice of Sankin's rights prior to the stock purchase by Benn - 5410 Corporation from Garfield. This finding is based on a preliminary finding that the Garfields showed Benn the May 1, 1958, stockholders agreements on March 14, 1959. According to Mrs. Garfield's current statement Benn was not shown nor was he told of the May 1, 1958 agreements. She states that it was not until April 21, 1959, that Benn was informed by Sankin of the disproportionate voting between Garfield and Sankin.

Paragraph no. 5 primarily concerns the briefcase incident involved in Civil Action No. 4002-60 which will be discussed in detail hereinafter, but it is fair to note that it does not refer to the International Timber Corporation stock certificate being in the briefcase.

Paragraph no. 6 again suggests that there was close co-operation between Garfield and Sankin in the latter part of

May 1959. Mrs. Garfield states that on May 27, 1959, she listened in on a telephone conversation between Sankin and Garfield concerning developments in Washington, D. C. in regard to Riggs National Bank's refusal to deliver 66 2/3 shares of stock in each of the two corporations involved. She states that in order to obtain a release of the stock from 5410 Corporation, Sankin and Garfield devised the scheme of leaving a copy of the proposed rescission agreement in draft form to be executed by Benn and Garfield in a very conspicuous place so that Sankin could claim to have learned of the fraud only at that time (May 28, 1959). If this statement is true, Mrs. Garfield is testifying to a set of circumstances which totally alters the finding of the Court if for no other reason than it establishes conspiratorial cooperation between Sankin and Garfield and notice to Sankin of Garfield's dealings with Benn before Sankin's entering into the stock purchase with Garfield on May 26, 1959.

Paragraph no. 7 of her statement sets forth a lengthy denial of any improper relationship between Benn and Mrs. Garfield. She assigns as the reason for her willingness to testify in such a manner, so obviously embarrassing to her, (1) that it was the only way to overcome the prejudice against her husband's testimony which would naturally follow from his judicial admission that he perpetrated a fraud on Sankin and (2) that she was promised an assignment by Garfield of all his interest in the Garfield Apartment Building after the trial of the case. This

promise by Garfield is reiterated in the eighth and final paragraph of her statement in which she appears to be praying the Court to vest the property in her.

Mrs. Garfield's statement clearly reveals great departures from her prior testimony and many findings of the Court. This defendant does not contend that this statement has the force of testimony but urges that it is an admission by a party to the litigation of facts inconsistent with prior testimony and, as such, casts serious doubt on her credibility. The version of the story which emerges from her current statement is far more similar to Benn's than to that advanced by the Garfields at trial and adopted by the Court.

The circumstances surrounding the preparation and execution of this statement by Janet Garfield are set forth in the affidavits of Vernell, Roman and Benn as follows: Sometime during May 1967 Roman, who is a member of the Florida Bar who has represented Benn on several occasions, met Janet Garfield by accident on a street in Miami. She stated that she was anxious to speak with Benn and repeatedly requested Benn's telephone number. Roman declined to give her the number even though she called him several times to repeat the request. After several such phone calls, Roman agreed to listen to her story, and, thereafter, Roman contacted Benn. He told Benn that Janet Garfield was very anxious to speak with him about what had happened with the trial in Washington, D. C., but Roman did

not describe to Benn any of the oral statements made to him by Janet Garfield. During the first part of June 1967, Benn telephoned her at the number she had given Roman, her sister's house, and was informed that she was at the Mt. Sinai Hospital, Miami Beach. Benn telephoned her at the hospital and during the conversation, which lasted the better part of an hour, she made the admissions set forth in her statement. The statement in the form of an affidavit was prepared by Benn on the basis of his recollection of the telephone conversation. The following evening he read over the telephone from Washington the written statement as prepared by him for her approval. She suggested changes, and this procedure continued over the next week, with Benn reading and rereading to her the statement as revised to reflect changes requested by her. It appears that she was in the hospital only 2 or 3 days, because most of the subsequent conversations were conducted from another telephone, which appeared to be a private residence. Finally, she stated that the statement did reflect the true facts and suggested that Benn bring it to Miami so that she could read it and sign it.

A meeting was arranged for June 27, 1967, and on that date Mrs. Garfield, Vernell, Roman and Benn met in Roman's office at about five o'clock in the afternoon. Vernell arrived shortly after the beginning of the meeting and upon his arrival Mrs. Garfield handed to him a copy of her statement saying as she did so that she had read it and that the contents of her statement

were correct and reflected a true recital of the events and circumstances therein related. Benn stated to all present that he had prepared the statement as a result of information supplied to him in a series of telephone conversations with Mrs. Garfield. Discussion then took place concerning the effect the statement would have on Mrs. Garfield's divorce proceeding then pending in Miami in which Vernell represented Mrs. Garfield. Thereafter, Vernell made certain recommendations not divulged in his affidavit and the meeting then broke up, Mrs. Garfield stating that she would drive Benn to the airport since she wished to discuss the matter further with him. At this point the statement had not been signed. At the airport, Benn asked her to sign the statement and she did. There was no Notary Public available at the airport.

Benn returned to Miami on June 29 or 30th with the intention of having the signed statement verified. This second meeting also took place at Roman's office during which Vernell requested time to examine the transcripts in these proceedings. Upon Benn's arrival at the airport, Mrs. Garfield requested Benn to give her the signed original of her statement, saying that she wished to show it again to Vernell, who did not at that time know that it had been signed. She stated further that after Vernell had seen it, it would be notarized. At the conclusion of the meeting, Mrs. Garfield stated that the meeting lasted longer than she had anticipated and she was pressed for time and could not verify the statement at that time. She

again drove Benn to the airport and stated to him that she would have the statement notarized and have it sent to him as soon as possible.

The copy of her statement submitted herewith is a xerox copy made by Benn in Washington on his return from Miami after the June 27th meeting. It has been examined by Mr. Appel, whose qualifications speak for themselves, and he has asserted the authenticity of the signature.

B. Janet Garfield's Doubtful Credibility Also
Extends to the Issues in Civil Action No. 4002-60.

There is submitted herewith the deposition of Frederick Silver taken in the Tax Court as James T. Benn vs. C.I.R., Docket No. 235-66. This Court has found that Janet Garfield returned all of the money in the stolen briefcase and that Benn's claim that \$60,000 was retained by the Garfield's is unsupported. Janet Garfield's current statement reveals that she telephoned Silver on May 13, 1959, to urge him to induce Benn to reverse the transactions with her husband at which time the remaining \$60,000 would be returned to him. According to Silver's deposition ^{2/} Mrs. Garfield telephoned him in New York City on May 13, 1959. She stated that she was trying to reach M r. Benn whom she thought was in New York City. When she learned from Silver that Benn was not there, she told him the following: that she contemplated marriage with Benn but that certain things had happened to complicate their relationship; that she had

2/ The issue is material to the Tax Court case because Benn claimed a \$60,000 theft loss deduction on his 1959 return.

taken Benn's briefcase and hid it not intending to keep it hoping to force Benn to return some papers that had something to do with a Washington Apartment House; that she found \$120,000 in \$100 bills in the briefcase and had later returned \$60,000 of that amount and was retaining the remaining \$60,000 together with some papers in the briefcase until Benn would return the papers to her and her husband. Silver was firm in his recollection that she stated that she was still retaining the \$60,000 at the time of her conversation with him on May 13, 1959. Clearly, there is a discrepancy between Silver's testimony and Janet Garfield's, since she testified, and the Court has found that all of the money was returned to Benn on May 9, 1959.

Benn departed Miami in the early morning of May 13, 1959, and did not see either of the Garfield's again until the proceedings in this action. If Silver's testimony is accepted, it must follow that the Garfield's had the \$60,000 in the late afternoon of May 13, 1959, hours after Benn's departure from Miami. There is no evidence in this record to show any contact between Benn and the Garfields from May 13, 1959, until this litigation. Further, there is no claim made that the \$60,000 was returned to Benn at any time other than May 9, 1959. Mrs. Garfield's current statement supports Silver's testimony in that she makes no reference to returning the briefcase on May 9, 1959.

C. The International Timber Company Stock and its Value

This Court has found that the crucial indicator of fraud in the dealings between Benn and Garfield is the fact that Garfield agreed to accept the International Timber Company stock in full payment of \$800,000.00 in notes. Based on the fact that the sole asset of International Timber Company was an option to purchase for \$10,000.00 on or before October 24, 1961, one-half of all the stock of Surinam American Timber Corporation, the Court has apparently found that the International Timber stock had little or no value. During the trial Benn attempted to show, by documents excluded as hearsay, that Surinam American had the right direct from the Surinam government to develop valuable timber concessions in Surinam and that the owner of International Timber would thus derive one-half of the benefits from the concessions.

The Court has not had the benefit of any admissible evidence bearing on the true value of the stock delivered to Garfield. That such evidence exists and might induce the Court to take appropriate action under Rule 59 is indicated by the following.

During late January and February 1965, Criminal Action No. 785-64, known as United States v. Charles Darwin Brown and M. Thomas Kent, was tried before Judge Keech of this Court. Involved in that case were the identical timber concessions at issue here. The principal witness in the Kent and Brown case was one Joe Harris who testified that he was referring to concessions which "Benn exchanged for an interest in an apartment house. The owner of the apartment house gave up the concessions. The apartment house owner is apparently bringing suit." Tr. 1067-1071. ^{2/} Harris went on to say that the value of the timber concessions in his opinion was over two million dollars. Tr. 1330-1334. He testified that the value of the standing

^{3/} References are to the transcript in United States v. Brown and Kent, Criminal Action No. 785-64.

timber could be as much as \$4,661,000.00. Tr. 1255-1257. He stated that an annual profit from the concessions of \$175,000.00 was a low estimate. Tr. 1222-1224. A timber cruise or valuation, covering the timber in these concessions and indicating their value was admitted in evidence in the Kent and Brown case and was also attached as an exhibit to this defendant's Motion for Leave to Present More Evidence heretofore filed in these proceedings. The Court is respectfully urged to examine this cruise in approaching the question of the value of the International Timber stock.^{4/}


There can be no doubt that this defendant made a poor showing at trial in his attempt to prove the value of the timber stock, but the Court is respectfully requested to take into account that he was a layman appearing pro se in a complex multi-party action. The Harris testimony reveals that the timber concessions were no figment of Benn's imagination. They do exist and given the proper opportunity, it is submitted could be linked in these proceedings to the timber stock accepted by Garfield. Such a showing would, it would appear, put the entire case in an entirely different light.

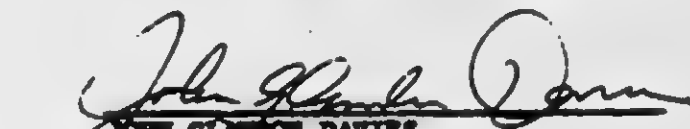
This Court has also found that Garfield received only a stock power and not a stock certificate for 2,000 shares of International Timber. This finding is based in part on the testimony of Janet Garfield to the effect that she saw such a stock certificate in Benn's briefcase during the time in which she was hiding it from him. For reasons given above, Janet Garfield's credibility can be called into question.

^{4/} The time allotted under Rule 59 has not been sufficient for this defendant to reproduce all of the exhibits on which he relies, and it is hoped that the Court will not be inconvenienced by being asked to refer back to the exhibits filed with the earlier motion; all counsel were served with that motion and should also have access to the exhibits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should exercise its prerogative under Rule 39 either to amend its findings on the basis of the matters raised herein or to permit the taking of additional testimony to examine into the matters submitted herewith. In weighing its decision on this motion, and particularly in determining what, if anything, could have been done to develop these matters at trial, the Court is especially urged to bear in mind Benn's pro se appearance.


WILLIAM H. DECK


JOHN GLENNON DAVIES
Attorneys for Defendant Benn
538 Pennsylvania Building
Washington, D. C.
393-6877

AFFIDAVIT

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STATE OF FLORIDA } ss:
COUNTY OF DADE }

Louis Vernell, being duly sworn, deposes and says that he is an Attorney at Law and licensed to practice in Florida with offices at 407 Lincoln Road, Miami Beach, Florida; that on and prior to June 27, 1967 your affiant was the attorney of record and did in fact represent Mrs. Janet Garfield in the divorce suit filed by Joseph A. Garfield against Mrs. Janet Garfield styled as Joseph A. Garfield vs. Martha Jeanette Garfield a/k/a Janet G. Garfield a/k/a Janet Garfield. Chancery No. 67-4758 in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Fla.

That, pursuant to a previous arrangement made by Mrs. Garfield, a meeting was held at the law offices of William B. Roman, Esquire, 435 Pan American Building, Miami, Florida on June 27, 1967 at or about 5:00 PM and those present were:

Mrs. Janet Garfield

Affiant Louis Vernell, as Attorney for Mrs. Garfield

Mr. James T. Benn

William B. Roman, Esquire, as Attorney for Mr. Benn

That your affiant, being unavoidably detained, arrived shortly after the time prescribed for the commencement of the meeting.

That upon your affiant's arrival, Mrs. Janet Garfield introduced Mr. James T. Benn to affiant and following the formalities of introduction, Mrs. Garfield handed over to your affiant a typewritten statement in the form of an affidavit, the contents of which related to a certain transaction concerning the Garfield Apartment Building in Washington, D.C. and other miscellaneous events that took place by and between the various parties named in the pending litigation in the United States District Court in Washington, D.C.

Mrs. Garfield stated when she handed such document to affiant that she had already read the same and that the contents of such statement were correct and that the same reflected a true recital of the events and circumstances therein related. A copy

Handwritten signature/initials

hereto and made a part of this affidavit.

It was further stated by Mr. Benn and in the presence of Mrs. Garfield on such occasion that he had previously prepared the statement for execution by Mrs. Garfield after, and as a result of information supplied to him by Mrs. Garfield in a series of telephone conversations had between Mrs. Garfield and himself.

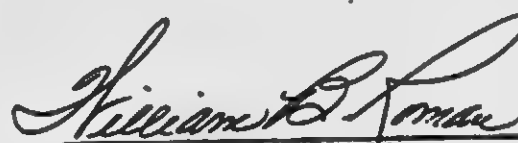
That a discussion thereupon ensued as what effect the signing of such statement by Mrs. Garfield would have upon her pending divorce litigation and also what extent her own claims of interest in the Garfield Apartment Building in Washington would be affected.

Your affiant rendered such advice and recommendations to Mrs. Garfield as his own judgment and opinion dictated. Mrs. Garfield thereupon stated that she would further discuss the matter with Mr. Benn and that she intended to drive him to the airport at which time your affiant left the parties present.

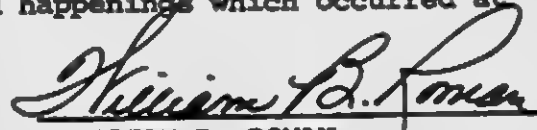

Louis Vernell

Subscribed and Sworn to before me this 26 day of August, 1967.

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES JUNE 27, 1968
BONDED THROUGH FRED W. DIEBELMORST


Notary Public

The undersigned hereby certifies that he was personally in attendance at the aforescribed meeting and that the statements and observations made by Louis Vernell in the foregoing affidavit contain a correct and true recital of the events and happenings which occurred at such meeting.


WILLIAM B. ROMAN

A F F I D A V I T

STATE OF FLORIDA }
 COUNTY OF DADE }

BEFORE ME, the undersigned authority, personally appeared WILLIAM B. ROMAN, who first being duly sworn, deposes and says: That in the latter part of May, 1967 your Affiant ran into JANET GARFIELD at Burdine's Department Store; that at that time the said JANET GARFIELD advised your Affiant that she was having domestic trouble; that her husband, JOSEPH GARFIELD, had filed a divorce suit against her and that he had accused her of having committed adultery with JAMES T. BENN; that at that time the said JANET GARFIELD requested your Affiant to get in touch with the said JAMES T. BENN to see if he could assist her in any manner in her present difficulties; that the said JANET GARFIELD at that time wrote down a phone number where she could be reached on a slip of paper and gave it to your Affiant; that, thereafter, Affiant during a telephone conversation with the said JAMES T. BENN communicated the request of the said JANET GARFIELD to the said JAMES T. BENN and gave him the telephone number which had been given to your Affiant by the said JANET GARFIELD.

FURTHER AFFIANT sayeth not...

 (SEAL)
 WILLIAM B. ROMAN

SWORN TO and subscribed before me
 at Miami, said County and State,
 this 25 day of January,
 1968.


 NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA at LARGE
 MY COMMISSION EXPIRES AUG. 2, 1969
 BONDED THROUGH FRED W. OESTERHOF

James T. Benn, being duly sworn, deposes and says:

That, Your affiant did phone Janet Garfield and as a result of a series of telephone conversations your affiant on June 27, 1967, met Janet Garfield and her attorney Louis Vernell at the law offices of William D. Roman, Esq.;

That, Your affiant during the numerous telephone conversations with her asked Mrs. Garfield if she would give a signed statement with respect to her testimony given before this Court in Civil Action Nos. 1493-59 and 4002-60, Mrs. Garfield stated that she would sign such a statement;

That, Your affiant after reading to Mrs. Garfield her previous statements made over the telephone and after she had corrected

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the language she desired to use in her statement your affiant prepared such a statement in the form of an affidavit in accordance with the facts and the events that had occurred according to Mrs. Garfield in connection with the issues involved in this pending action. Your affiant had such prepared statement with him when he arrived in Miami on June 27, 1967,

That, in the presence of Mr. Vernell, Mr. Roman and your affiant Mrs. Garfield admitted that the statement set forth a true recital of the events and circumstances surrounding the transaction that Joseph Garfield and 5410 Connecticut Corporation entered into and the events and circumstances engaged in by Mr. Garfield and his cousin Julius Sankin including Mr. Garfield's uncle and Mr. Sankin's Father-in -Law, Herman Mankes;

That, the said meeting got under way at approximately 5 p.m. and lasted approximately six hours and thereafter Mrs. Garfield stated that she would further discuss the subject matter while driving your affiant to the airport;

That, Mrs. Garfield accompanied by your client arrived at the airport shortly after the meeting closed and while seated in their automobile Mrs. Garfield signed the said statement after having again re-read it. Your affiant attempted to find a Notary Public but none was available at that time.


James T. Benn

Subscribed and sworn to before me this 29th day of January 1968.

My Commission Expires:


(Notary Public)

STATE OF FLORIDA } ss:
COUNTY OF DADE }

Louis Vernell, being duly sworn, deposes and says that he is an Attorney at Law and licensed to practice in Florida with offices at 407 Lincoln Road, Miami Beach, Florida; that on and prior to June 27, 1967 your affiant was the attorney of record and did in fact represent Mrs. Janet Garfield in the divorce suit filed by Joseph A. Garfield against Mrs. Janet Garfield styled as Joseph A. Garfield vs. Martha Jeanette Garfield a/k/a Janet G. Garfield a/k/a Janet Gaffield. Chancery No. 67-4758 in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Fla.

That, pursuant to a previous arrangement made by Mrs. Garfield, a meeting was held at the law offices of William B. Roman, Esquire, 435 Pan American Building, Miami, Florida on June 27, 1967 at or about 5:00 PM and those present were:

Mrs. Janet Garfield

Affiant Louis Vernell, as Attorney for Mrs. Garfield

Mr. James T. Benn

William B. Roman, Esquire, as Attorney for Mr. Benn

That your affiant, being unavoidably detained, arrived shortly after the time prescribed for the commencement of the meeting.

That upon your affiant's arrival, Mrs. Janet Garfield introduced Mr. James T. Benn to affiant and following the formalities of introduction, Mrs. Garfield handed over to your affiant a typewritten statement in the form of an affidavit, the contents of which related to a certain transaction concerning the Garfield Apartment Building in Washington, D.C. and other miscellaneous events that took place by and between the various parties named in the pending litigation in the United States District Court in Washington, D.C.

Mrs. Garfield stated when she handed such document to affiant that she had already read the same and that the contents of such statement were correct and that the same reflected a true recital of the events and circumstances therein related. A copy of such statement as so approved by Mrs. Garfield being attached

Louis Vernell



hereto and made a part of this affidavit.

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It was further stated by Mr. Benn and in the presence of Mrs. Garfield on such occasion that he had previously prepared the statement for execution by Mrs. Garfield after, and as a result of information supplied to him by Mrs. Garfield in a series of telephone conversations had between Mrs. Garfield and himself.

That a discussion thereupon ensued as what effect the signing of such statement by Mrs. Garfield would have upon her pending divorce litigation and also what extent her own claims of interest in the Garfield Apartment Building in Washington would be affected.

Your affiant rendered such advice and recommendations to Mrs. Garfield as his own judgment and opinion dictated. Mrs. Garfield thereupon stated that she would further discuss the matter with Mr. Benn and that she intended to drive him to the airport at which time your affiant left the parties present.


Louis Vernell

Subscribed and Sworn to before me this 26 day of August, 1967.

My Commission Expires:


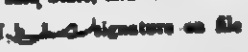
NOTARY PUBLIC STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES JUNE 27, 1968
BONDED THROUGH FRED W. DIESTELHORST


Notary Public

NO 47612 A

COUNTY OF DADE } ss.
STATE OF FLORIDA }

I, E. B. LEATHERMAN, Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for the County of Dade, and State of Florida, the same being a Court of Record of the aforesaid County and State having by law a seal, DO HEREBY CERTIFY that


by whom the foregoing acknowledgment or proof was taken, and whose name is subscribed thereto, was at the time of taking the same, a Notary Public residing in said County, duly commissioned and sworn and authorized by the laws of said State, to take the acknowledgment or proof of deeds and other instruments in writing to be recorded in said State, and to administer oaths or affirmations in said County; that I have compared the signature of such Notary Public with a specimen of  signature on file in my office, and verily believe that the signature to the foregoing original Certificate is genuine.

I FURTHER CERTIFY that I have compared the impression of the seal affixed thereto with a specimen impression thereof on file in my office, and I verily believe the impression of such seal upon the original Certificate to be genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 28 day of August, 1967.

E. B. LEATHERMAN,
Clerk Circuit Court

By


C. P. COPELAND

Deputy Clerk

AFFIDAVIT OF JANET GARFIELD

STATE OF FLORIDA }
COUNTY OF DADE }

to wit:

Janet Garfield, being duly sworn, deposes and says that she is the wife of Joseph A. Garfield who is party defendant to the actions pending in the United States District Court for the District of Columbia styled as Julius Bankin vs. 5410 Connecticut Ave. Corporation, et al, CA. No. 1493-59, and Benn vs. Joseph A. Garfield and Janet Garfield, CA. No. 4002-60.

Your Affiant appeared as a party and witness in said actions, at which time your Affiant gave certain incomplete testimony not fully in accord with all the facts then known and this has been a matter of great worry and concern to your Affiant since the giving of said testimony has affected her then already poor health.

Your Affiant is now desirous of setting the record straight by formally disclosing the true and complete facts about which she has personal knowledge with regards to the following, either by then being personally present and having observed or heard what transpired or personally participated, to the end that her erroneous and incomplete testimony at the trial of said case shall be corrected and her conscience thereby relieved of the burden.

The misconstrued testimony, and incomplete testimony given by your Affiant was done at the demand and under coercion of her husband. She went along with her husband's scheme and some of the testimony already given is part of that scheme. The scheme was to do whatever was necessary to oust and force James T. Benn out of the entire transaction and also from 5410 Connecticut Avenue Corporation.

1) The incomplete testimony with respect to;

THE JOSEPH A. GARFIELD--HERMAN MANKES CONFERENCES ON MAY 6-7, 1959; THE DECISION RESULTING THEREFROM AND JULIUS BANKIN'S KNOWLEDGE THEREOF AS OF MAY 8, 1959.

My husband and Mr. Mankes met on May 6-7, 1959 in Miami. As a result thereof, my husband agreed to repudiate his transactions with Mr. Benn and 5410 Corporation, and to collaborate with and, aid Mr. Bankin in the ousting and forcing Mr. Benn out of the transactions and 5410 Corporation. Mr. Bankin was contacted by telephone and as a result thereof Mr. Bankin requested and received from 5410 Corporation, an extension of his 30-day purchase-option through May 30, 1959. Your Affiant listened in on a telephone extension in her bedroom while Mr. Mankes and my

This document consisting of five (5) pages to each of which I have affixed my notated seal was attached to affidavit of Janet Garfield at time of signature by her.
William H. Rouse

Janet Garfield

husband reviewed the foregoing over the telephone on or about May 8, 1959.

2) The incomplete testimony with respect to;

JOSEPH A. GARFIELD'S \$1,000.00 CHECK DATED APRIL 20, 1959
AND THE ENCASMENT THEREOF BY JAMES F. BENN ON SAME DATE.

My husband needed additional cash during our stay in Washington, D.C. My husband knew that Mr. Benn carried a large amount of cash with him. My husband made out a check for \$1,000.00 and handed it to Mr. Benn and Mr. Benn in turn gave my husband ten (10) one hundred (\$100) dollar bills. Mr. Benn asked my husband to endorse the check acknowledging receipt of \$1,000.00--my husband acknowledged receipt of said cash by signing on the back of said check.

3) The incomplete testimony with respect to;

MR. BENN DELIVERED THE SURINAM TIMBER CONCESSIONS FILE
TO MR. GARFIELD ON OR ABOUT APRIL 26, 1959; THIS FILE
WAS RETAINED BY MY HUSBAND AND NOT RETURNED TO MR. BENN.

My husband became visibly upset when Mr. Benn informed him that Mr. Senkin accused my husband of receiving one-half or \$37,500.00 of the \$75,000.00 that Mr. Senkin withdrew from the corporate bank account on April 21, 1959. My husband stated that he wanted out of the whole involvement with Mr. Senkin and requested Mr. Benn to conclude the transactions with him as soon as possible. After some discussion, Mr. Benn left our home and returned several hours later and handed my husband, in the presence of your Affiant, a large, thick manila file folder which contained the papers relating to the Surinam Timber Concession.

4) The incomplete testimony with respect to;

MR. GARFIELD DID NOT SHOW MR. BENN THE MAY 1, 1958
STOCKHOLDER AGREEMENTS NOR WAS HE TOLD ABOUT THEM.

Mr. Benn was not shown nor was he told of the existence of the May 1, 1958 Stockholders' Agreements. My husband told Mr. Benn, in my presence, that he and Mr. Senkin had a verbal agreement to extend each to the other a 30-day purchase-option. This was reduced to writing and signed by both my husband and Mr. Benn. Mr. Senkin, in my presence, on May 21, 1959, informed Mr. Benn, for the first time, that he had an agreement with Mr. Garfield about the disproportionate voting of the stock. Mr. Benn informed Mr. Senkin that he knew nothing about it.

5) The incomplete testimony with respect to;

MR. GARFIELD PARTICIPATED IN THE TAKING OF MR. BENN'S BRIEFCASE.

Mr. Benn arrived on May 9, 1959 at our residence in Coral Gables, Florida, as an invited guest. The briefcase was primarily taken for the purpose of depriving Mr. Benn of all his documents in connection with the transactions entered into with my husband. Your Affiant did, however, find cash in the briefcase which was not expected. Your Affiant fully intended that the cash should be returned, but my husband refused to return it to Mr. Benn. Included among the documents found in the briefcase were seven or eight promissory notes totalling \$208,000.00 made by Garfield and Senkin, Inc., Julius Senkin, Inc. and Julius Senkin individually. The notes were payable to the order of my husband and were endorsed by him in blank. When it became clear to both my husband and your Affiant that the withholding of Mr. Benn's briefcase would not induce Mr. Benn to reverse the transaction, my husband instructed your Affiant on May 13, 1959 to telephone Mr. Silver in New York City. After telling Mr. Silver the history of the incident, the taking of Mr. Benn's briefcase, your Affiant requested Mr. Silver to intervene and prevail upon Mr. Benn to reverse or rescind the whole transaction and in exchange therefor Mr. Benn would receive the remaining \$60,000.00 of the cash in the briefcase. My husband pre-planned and, your Affiant joined in the taking of Mr. Benn's briefcase after he (Mr. Garfield) agreed with Mr. Mankes and Mr. Senkin on May 6-7, and on May 8, 1959 respectfully.

6) The incomplete testimony with respect to;

YOUR AFFIANT LISTENED ON AN EXTENSION TELEPHONE IN HER BEDROOM WHILE HER HUSBAND RECEIVED A TELEPHONE CALL FROM MR. SANKIN DURING THE EVENING OF MAY 26-27, 1959.

During the late evening on or about May 27, 1959 Mr. Senkin telephoned my husband while your Affiant listened in on the conversation on a telephone extension in her bedroom and she heard Mr. Senkin review with Mr. Garfield the story about the Riggs National Bank refusal to give up or transfer to Mr. Senkin the shares of stock held by the Bank in Escrow because 5410 Connecticut Ave., Corporation owned the shares of stock according to the writings in possession of the Riggs Bank. Mr. Senkin inquired if it were possible to get a release of the stock from 5410 Connecticut Ave., Corporation and my husband expressed no hope in doing so. Mr. Senkin told my husband that he, as agreed, would do anything to get the shares of stock and place them into the hands of my husband. Mr. Senkin asked my husband to meet him in Washington, D.C. and to bring with him a copy of the rescission agreement that was prepared for Mr. Benn's signature. Mr. Senkin

instructed my husband to place the said rescission agreement on the desk, in a very conspicuous place, in order that Mr. Sankin could easily notice it while several persons would be available or nearby as witnesses. Mr. Sankin stated to my husband that he would pretend that he learned then, at their next proposed meeting, for the first time the contents of the rescission agreement. Mr. Sankin cautioned my husband not to reveal to anyone that Mr. Sankin already had, in his possession, a copy of the said unsigned rescission agreement.

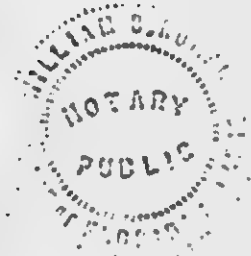
7) The incomplete testimony with respect to;

THE NONEXISTENT PERSONAL RELATIONSHIP BETWEEN YOUR AFFIANT AND MR. BENN AND HER UNFORTUNATE CHOICE OF WORDS WERE MISCONSTRUED IS WELL KNOWN TO YOUR AFFIANT AND HER HUSBAND. THIS ISSUE WAS CREATED TO OFFSET THE DISADVANTAGES OF HIS JUDICIAL ADMISSION.

See Verdict

The sole purpose for introducing this fictitious personal relationship in this case between your Affiant and Mr. Benn is because my husband admitted in open Court, before Honorable Judge Pine, United States District Court for the District of Columbia on June 5, 1959, that his actions were fraudulent and that my husband schemed to deprive and defraud Mr. Sankin of his rights under the May 1, 1958 Stockholder Agreements. My husband informed your Affiant that because the Riggs National Bank refused to deliver to Mr. Sankin the 66 2/3 shares of stock issued by each of the two corporations, Garfield and Sankin, Inc. and Julius Sankin, Inc., that he (my husband) would have to confess to the Court that he perpetrated a fraud against Mr. Sankin in order to influence the Court to issue the injunction, thereby making Mr. Sankin an innocent party who has been deprived of his rights, where as a matter of fact, Mr. Sankin had full knowledge of the agreement reached between my husband and Mr. Mankes as of May 8, 1959 and everything my husband did thereafter. Because of my husband's said confession it became necessary to get the Court's sympathy and to rehabilitate my husband before the Court is really why this fictitious issue was introduced. After several days of discussion my husband prevailed over your Affiant and induced your Affiant to agree to testify against Mr. Benn in such a way as to influence the Court to believe that an illicit relationship had existed between your Affiant and Mr. Benn. Your Affiant agreed to so testify and my husband promised that in exchange for such testimony he would assign to your Affiant all of his interests in and to the Garfield Apartment Building, 5410 Connecticut Ave. N.W., Washington D.C. which he voluntarily reaffirmed after the trial of this case. My husband well knew that there were no improper relations between your Affiant and James T. Benn, nevertheless, your Affiant agreed with her husband to claim an illicit relationship had existed between

your Affiant and Mr. Benn and, even a proposal of marriage, all of which was not true as both your Affiant and her husband well knew, but was stated to be true solely for the purpose of getting the sympathy of the Court for my husband. At all times, since my husband first introduced your Affiant to Mr. Benn he has been courteous, considerate and respectful as would be usual between a gentleman and a lady and nothing beyond that. When your Affiant used the word "amour" in her testimony she did not intend to convey any idea of an improper or illicit relationship but her testimony has been so construed, where in fact no wrongdoing or improper relationship ever existed between your Affiant and Mr. Benn and my husband well knew that none ever existed. This device was used in order to get the Court's sympathy because of the disadvantage Mr. Garfield was placed when it became necessary for him to admit his alleged attempt to defraud Mr. Sankin solely because the Riggs National Bank on May 27, 1959, refused to deliver the escrowed stock to Mr. Sankin for my husband.



8) The incomplete testimony with respect to;

MR. GARFIELD REAFFIRMED HIS PROMISE ON DECEMBER 25, 1964 TO CONVEY TO YOUR AFFIANT ALL OF HIS RIGHTS, TITLE AND INTERESTS IN AND TO MY HUSBAND'S SHARE IN THE GARFIELD APARTMENT BUILDING, INCLUDING ALL PROCEEDS AND BENEFITS. YOUR AFFIANT RESPECTFULLY REQUESTS THAT SUCH BE DECREED BY THIS COURT AND SAME VESTED IN THE NAME JANET GARFIELD.

Janet Garfield

My husband promised to convey to your Affiant all of his rights and interests in and to the Garfield Apartment Building on or about May 8, 1959. He reaffirmed this many times thereafter and also reaffirmed again his promise on Christmas Day, December 25, 1964, after your Affiant's testimony before the Court. All of Mr. Garfield's rights and interests and all proceeds and benefits belongs to your Affiant and this Court is respectfully prayed to vest same in your Affiant.

Janet Garfield

Before me personally appeared Janet Garfield, known to me, who Subscribed and Swore that the foregoing five pages of Affidavit was done freely and voluntarily, and acknowledged to me this Act and Deed this ____ day of June, 1967.

My Commission expires:

Notary Public

WASHINGTON

DISTRICT OF COLUMBIA

AFFIDAVIT REPORT

OF

HANDWRITING EXAMINATION

1. The undersigned affiant is CHARLES ANDREW APPEL, JR., of 3383 Stephenson Place, Northwest, Washington, D.C. where he maintains a laboratory and engages in the profession of Document Analysis, by which is meant the examination of handwriting for evidence identifying the writer, examination of typewriting to identify the typewriter, and related analysis of paper and ink, pens and other writing instruments for evidence of authenticity.
2. He is licensed by the District of Columbia in this profession as Document Examiner at this address which he has performed since 1948 under private contract when he retired with honors from the position of Principal Examiner of the Laboratory of the Federal Bureau of Investigation, having occupied this position since before the formal opening of the F.B.I. Laboratory in 1932.
3. He became qualified for this work while employed as Special Agent of the Federal Bureau of Investigation since 1924, by studying the literature on the subject, performing research experiments, attending lectures by qualified experts such as J. Fordyce Woods at Northwestern University, Albert S. Osborn of New York and Dr. Wilmer Souder of the National Bureau of Standards, Washington, D.C., and acting as apprentice, that is examining cases which were later submitted to qualified examiners until skill was acquired when he was assigned to make examinations for the F.B.I.,
4. He has been admitted to testify as qualified in each of the United States except Hawaii in Puerto Rico and Pakistan, in person and by deposition in Napoleonic Law countries such as exist in Europe and South America, and in special courts, commissions, and hearings of Congress,
5. Additional details of his qualifications are given in a summary incorporated herein as page 2,

CHARLES A. APPEL, JR.

DOCUMENT EXAMINER
3383 STEPHENSON PLACE, N. W.
WASHINGTON, D. C. 20015

QUALIFICATIONS AS DOCUMENT EXAMINER.

Full Name: Charles Andrew Appel, Junior

Occupation: Examiner of questioned documents in civil cases, which includes the identification of handwriting, typewriting and other mechanical impressions, analysis of paper, ink, and writing materials: determination of authenticity.

Training, general: Graduated with degree LLB Georgetown University Law School 1922. Admitted to Bar District of Columbia 1922 and to U.S. Supreme Court 1929, JD degree 1967 (Retroactive)

Training, special: Appointed Special Agent, Federal Bureau of Investigation in 1924, Began study of Questioned Documents about 1930 studying the literature, attending lectures of qualified examiners such as J. Fordyce Wood at Northwestern University, Chicago; Albert S. Osborn of New York, Dr. Wilmer Souder, National Bureau of Standards, Washington. Conducted research experiments and studied cases later examiner by qualified examiners until skill developed.

Qualified experience: Principal Examiner FBI Laboratory from formal opening in 1932 until retired, end of 1948. Then continued the work to present as private examiner. Lectured to schools for Special Agents and investigators, to apprentice document examiners and to National Police Academy, to Local Police Schools; prepared texts used in F.B.I. work.

Testimony: Has testified in each of the United States except Hawaii, and in Puerto Rico and Pakistan in person in State Federal and Military Courts and before Congressional Committees, U.S. Commissions, Special Courts, and by deposition in Napoleonic Law countries such as France and South America.

Cases:

R. Hauptmann, Kidnaping, Bronx, New York
Manny Strewl et al, Kidnaping, Binghamton, N.Y.
Duquesne German Espionage Conspiracy, New York
Ludwig German Espionage Conspiracy, New York
So-called Pendergast Election Frauds cases, Kansas City
Velva Lee Dickinson Japanese Espionage, New York
TWA v. Howard Hughes et al, New York
Banes v. Lee, San Juan, P.R.
Aristotle Onassis v. Saudi Arabia suit Paris, Fr.
Gurmani v. Suleri trial at Lahore, Pakistan (Kashmir Accession)
Vincent Astor, Harry Publicker, Gertrude Lare, K. Roth
Mary Townsend, W. Moody - typical will cases
Individual cases submitted by Judges to act as Court Expert
under new rules in D.C., Norfolk, Baltimore

6. There was submitted to him by Mr. James T. Benn the following exhibits for examination: (Copies attached hereto)
 1. Affidavit of Janet Garfield ___ day of June, 1967
 2. Examples of signatures of Janet Garfield on;
 - Def. Ex. G 4/8/59, Agreement dated Mar. 14, 1959
 - Benn Deposition Ex. 43 Exchange Agreement 5/4/59
 - " " " 44 Receipt for Stock Cert.
 - " " " 45 Joint letter of Authorization.
7. The purpose of the examination was to ascertain if there is evidence in the signature "Janet Garfield" on item 1 that this was or was not executed by Janet Garfield, writer of the example signatures on the item 2 documents,
8. A study was made of the example signatures to become familiar with the writing motion habits of Janet Garfield. In this analysis copies of the designs caused by writing motions were made in the analysis notes to record peculiarities and make sure each feature was perceived and understood as to significance; A similar study was then made of the questioned signature on item 1, copies being again made of design peculiarities in analysis notes,
9. It was found that Janet Garfield writes at speed with automatic pen movements modifying conventional copy book letter designs because of individuality in coordination. Thus her signature design pattern is distinctive and individual.

The questioned signature was found to have the same design pattern as that present in the examples so that if it were removed from the document and mingled with examples it would not stand out because of design differences. It is within the limits of natural variations occurring in the examples.
10. It is possible for one person to simulate the signature of another within the resemblance in this case, by one of two methods; tracing, in which faint guide lines or images of some authentic signature are traced over, or by writing with freehand pen motions while looking at an authentic signature, copying designs,

In tracing it is necessary to move the pen slowly in drawing motions rather than writing, which causes to appear in the resulting signature lines, irregularities introduced by the drawing motions. "Tremor of forgery" is one type of such irregularities being a sideways deviation of the pen not from trembling as the name might suggest, but from the slow forward pressure. To make lines which are smooth the pen point must travel forward beyond drawing speed. This is a well known effect illustrated by the need to make fast sweeping curves in creating a freehand circle.

Sometimes in creating a forgery by tracing the line irregularities are obvious in comparison to authentic signatures and this causes the forger to experiment, so finding a need to speed up. He therefor reverts to freehand writing movements (sometimes over the guide lines). When simulating by freehand writing movements it is impossible to completely suppress the motion habits of the forger. This causes the smaller motion forms to resemble normal shapes of the forger more than those of the authentic signature being copied.

11. Accordingly the writing lines of the item 1 signature were studied under magnification seeking signs of line irregularities of the type described because of tracing or differences in the smaller designs caused by motion habits of the person who impressed the questioned signature.

It was found that such irregularities as occur in the item 1 signature are of the kind introduced by the ball point pen as pressure varies from point to point in designs. This instrument is so delicate in responding to slight changes during writing that it leaves obvious irregularities as the writer follows automatic motions, for instance at the top left of "1" when the direction of motion is changed. In examples there were found similar irregularities of this kind, as those found in the

questioned signature, located at the same positions. Variations in line widths occur also in the same positions in the questioned signature as they occur in examples.

(The above is not to be understood as a conclusion by the examiner that the writer of the questioned signature used a ball point pen, the reference to this pen was mentioned only because a demonstration of this effect is most easily seen using that pen. Similar irregularities are also created by other pens, the marks being slightly different in shape.)

12. The relative sizes and proportions, slant, speed, alignments and spacings of the questioned signature are similar to those shown in examples. These features are significant regarding identification in the same way as line irregularities due to pen motions because they are relatively unconscious and automatic.

No differences of a type produced by different writers were found between the questioned and example signatures.

13. It is therefore concluded that the questioned signature of Janet Garfield on item 1 is authentic and was executed by Janet Garfield, writer of the examples.

As all of the exhibits submitted are reproductions it was not possible to study the paper under the signatures on which additional evidence might appear. The writing images on the reproductions were found accurate and adequate for the analysis based on the designs.


CHARLES ANDREW APPEL, JR., EXAMINER.

Before me the undersigned Notary Public appeared the above Charles Andrew Appel, Jr., personally known to me, this 15th day of January, 1968 and being duly sworn signed the above signature to certify to the truth of this report.


NOTARY PUBLIC, DISTRICT OF COLUMBIA.

Notary Public
District of Columbia
My commission expires May 14, 1968

AFFIDAVIT

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STATE OF FLORIDA } ss:
COUNTY OF DADE }

Louis Vernell, being duly sworn, deposes and says that he is an Attorney at Law and licensed to practice in Florida with offices at 407 Lincoln Road, Miami Beach, Florida; that on and prior to June 27, 1967 your affiant was the attorney of record and did in fact represent Mrs. Janet Garfield in the divorce suit filed by Joseph A. Garfield against Mrs. Janet Garfield styled as Joseph A. Garfield vs. Martha Jeanette Garfield a/k/a Janet G. Garfield a/k/a Janet Gaffield. Chancery No. 67-4758 in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Fla.

That, pursuant to a previous arrangement made by Mrs. Garfield, a meeting was held at the law offices of William B. Roman, Esquire, 435 Pan American Building, Miami, Florida on June 27, 1967 at or about 5:00 PM and those present were:

Mrs. Janet Garfield

Affiant Louis Vernell, as Attorney for Mrs. Garfield

Mr. James T. Benn

William B. Roman, Esquire, as Attorney for Mr. Benn

That your affiant, being unavoidably detained, arrived shortly after the time prescribed for the commencement of the meeting.

That upon your affiant's arrival, Mrs. Janet Garfield introduced Mr. James T. Benn to affiant and following the formalities of introduction, Mrs. Garfield handed over to your affiant a typewritten statement in the form of an affidavit, the contents of which related to a certain transaction concerning the Garfield Apartment Building in Washington, D.C. and other miscellaneous events that took place by and between the various parties named in the pending litigation in the United States District Court in Washington, D.C.

Mrs. Garfield stated when she handed such document to affiant that she had already read the same and that the contents of such statement were correct and that the same reflected a true recital of the events and circumstances therein related. A copy of such statement as so approved by Mrs. Garfield being attached

Lou Vernell



hereto and made a part of this affidavit.

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It was further stated by Mr. Benn and in the presence of Mrs. Garfield on such occasion that he had previously prepared the statement for execution by Mrs. Garfield after, and as a result of information supplied to him by Mrs. Garfield in a series of telephone conversations had between Mrs. Garfield and himself.

That a discussion thereupon ensued as what effect the signing of such statement by Mrs. Garfield would have upon her pending divorce litigation and also what extent her own claims of interest in the Garfield Apartment Building in Washington would be affected.

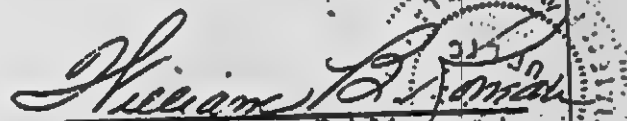
Your affiant rendered such advice and recommendations to Mrs. Garfield as his own judgment and opinion dictated. Mrs. Garfield thereupon stated that she would further discuss the matter with Mr. Benn and that she intended to drive him to the airport at which time your affiant left the parties present.


Louis Vernell

Subscribed and Sworn to before me this 26 day of August, 1967.

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES JUNE 27, 1968
BONDED THROUGH FRED W. BERTENHOFF


Notary Public

NO 47612 A

COUNTY OF DADE }
STATE OF FLORIDA } SS.

I, E. B. LEATHERMAN, Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for the County of Dade, and State of Florida, the same being a Court of Record of the aforesaid County and State, having by law a seal, DO HEREBY CERTIFY that

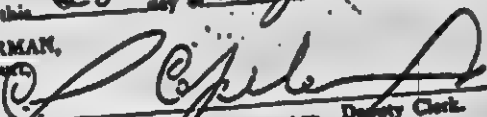
by whom the foregoing acknowledgment or proof was taken, and whose name is subscribed thereto, was at the time of taking the same, a Notary Public residing in said County, duly commissioned and sworn and authorized by the laws of said State, to take the acknowledgment or proof of deeds and other instruments in writing to be recorded in said State, and to administer oaths or affirmations in said County; that I have compared the signature of such Notary Public with a specimen of his signature on file in my office, and verily believe that the signature to the foregoing original Certificate is genuine.

I FURTHER CERTIFY that I have compared the impression of the seal affixed thereto with a specimen impression thereof on file in my office, and I verily believe the impression of such seal upon the original Certificate to be genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 28 day of August, 1967

E. B. LEATHERMAN,
Clerk Circuit Court

By


C. P. COPELAND
Deputy Clerk

AFFIDAVIT OF JANET GARFIELD

7 fine (5) pages to each of which I have affixed my notried seal upon attached to affidavit of fine & made at time of signature by her

STATE OF FLORIDA }
COUNTY OF DADE } to wit:

Janet Garfield, being duly sworn, deposes and says that she is the wife of Joseph A. Garfield who is party defendant to the actions pending in the United States District Court for the District of Columbia styled as Julius Sankin vs. 5410 Connecticut Ave. Corporation, et al, CA. No. 1493-59, and Benn vs. Joseph A. Garfield and Janet Garfield, CA. No. 4002-60.

Your Affiant appeared as a party and witness in said actions, at which time your Affiant gave certain incomplete testimony not fully in accord with all the facts then known and this has been a matter of great worry and concern to your Affiant since the giving of said testimony has affected her then already poor health.

Your Affiant is now desirous of setting the record straight by formally disclosing the true and complete facts about which she has personal knowledge with regards to the following, either by then being personally present and having observed or heard what transpired or personally participated, to the end that her erroneous and incomplete testimony at the trial of said case shall be corrected and her conscience thereby relieved of the burden.

Don Chubb

The misconstrued testimony, and incomplete testimony given by your Affiant was done at the demand and under coercion of her husband. She went along with her husband's scheme and some of the testimony already given is part of that scheme. The scheme was to do whatever was necessary to oust and force James T. Benn out of the entire transaction and also from 5410 Connecticut Avenue Corporation.

- 1) The incomplete testimony with respect to;

THE JOSEPH A. GARFIELD--HERMAN MANKES CONFERENCES ON MAY 6-7, 1959; THE DECISION RESULTING THEREFROM AND JULIUS SANKIN'S KNOWLEDGE THEREOF AS OF MAY 8, 1959.

My husband and Mr. Mankes met on May 6-7, 1959 in Miami. As a result thereof, my husband agreed to repudiate his transactions with Mr. Benn and 5410 Corporation, and to collaborate with and, aid Mr. Sankin in the ousting and forcing Mr. Benn out of the transactions and 5410 Corporation. Mr. Sankin was contacted by telephone and as a result thereof Mr. Sankin requested and received from 5410 Corporation, an extension of his 30-day purchase-option through May 30, 1959. Your Affiant listened in on a telephone extension in her bedroom while Mr. Mankes and my

husband reviewed the foregoing over the telephone on or about May 8, 1959. 169

2) The incomplete testimony with respect to;

JOSEPH A. GARFIELD'S \$1,000.00 CHECK DATED APRIL 20, 1959
AND THE ENCASUREMENT THEREOF BY JAMES T. BENN ON SAME DATE.

My husband needed additional cash during our stay in Washington, D.C. My husband knew that Mr. Benn carried a large amount of cash with him. My husband made out a check for \$1,000.00 and handed it to Mr. Benn and Mr. Benn in turn gave my husband ten (10) one hundred (\$100) dollar bills. Mr. Benn asked my husband to endorse the check acknowledging receipt of \$1,000.00--my husband acknowledged receipt of said cash by signing on the back of said check.

3) The incomplete testimony with respect to;

MR. BENN DELIVERED THE SURINAM TIMBER CONCESSIONS FILE
TO MR. GARFIELD ON OR ABOUT APRIL 26, 1959; THIS FILE
WAS RETAINED BY MY HUSBAND AND NOT RETURNED TO MR. BENN.

My husband became visibly upset when Mr. Benn informed him that Mr. Sankin accused my husband of receiving one-half or \$37,500.00 of the \$75,000.00 that Mr. Sankin withdrew from the corporate bank account on April 21, 1959. My husband stated that he wanted out of the whole involvement with Mr. Sankin and requested Mr. Benn to conclude the transactions with him as soon as possible. After some discussion, Mr. Benn left our home and returned several hours later and handed my husband, in the presence of your Affiant, a large, thick manila file folder which contained the papers relating to the Surinam Timber Concession.

4) The incomplete testimony with respect to;

MR. GARFIELD DID NOT SHOW MR. BENN THE MAY 1, 1958
STOCKHOLDER AGREEMENTS NOR WAS HE TOLD ABOUT THEM.

Mr. Benn was not shown nor was he told of the existence of the May 1, 1958 Stockholders' Agreements. My husband told Mr. Benn, in my presence, that he and Mr. Sankin had a verbal agreement to extend each to the other a 30-day purchase-option. This was reduced to writing and signed by both my husband and Mr. Benn. Mr. Sankin, in my presence, on May 21, 1959, informed Mr. Benn, for the first time, that he had an agreement with Mr. Garfield about the disproportionate voting of the stock. Mr. Benn informed Mr. Sankin that he knew nothing about it.

5) The incomplete testimony with respect to;

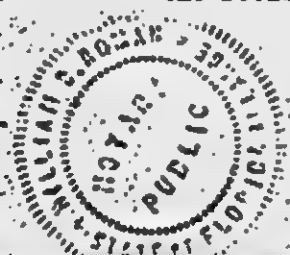
MR. GARFIELD PARTICIPATED IN THE TAKING OF MR. BENN'S BRIEFCASE.

Mr. Benn arrived on May 9, 1959 at our residence in Coral Gables, Florida, as an invited guest. The briefcase was primarily taken for the purpose of depriving Mr. Benn of all his documents in connection with the transactions entered into with my husband. Your Affiant did, however, find cash in the briefcase which was not expected. Your Affiant fully intended that the cash should be returned, but my husband refused to return it to Mr. Benn. Included among the documents found in the briefcase were seven or eight promissory notes totalling \$208,000.00 made by Garfield and Bankin, Inc., Julius Bankin, Inc. and Julius Bankin individually. The notes were payable to the order of my husband and were endorsed by him in blank. When it became clear to both my husband and your Affiant that the withholding of Mr. Benn's briefcase would not induce Mr. Benn to reverse the transaction, my husband instructed your Affiant on May 13, 1959 to telephone Mr. Silver in New York City. After telling Mr. Silver the history of the incident, the taking of Mr. Benn's briefcase, your Affiant requested Mr. Silver to intervene and prevail upon Mr. Benn to reverse or rescind the whole transaction and in exchange therefor Mr. Benn would receive the remaining \$60,000.00 of the cash in the briefcase. My husband pre-planned and, your Affiant joined in the taking of Mr. Benn's briefcase after he (Mr. Garfield) agreed with Mr. Mankes and Mr. Bankin on May 6-7, and on May 8, 1959 respectfully.

6) The incomplete testimony with respect to;

YOUR AFFIANT LISTENED ON AN EXTENSION TELEPHONE IN HER BEDROOM WHILE HER HUSBAND RECEIVED A TELEPHONE CALL FROM MR. BANKIN DURING THE EVENING OF MAY 26-27, 1959.

During the late evening on or about May 27, 1959 Mr. Bankin telephoned my husband while your Affiant listened in on the conversation on a telephone extension in her bedroom and she heard Mr. Bankin review with Mr. Garfield the story about the Riggs National Bank refusal to give up or transfer to Mr. Bankin the shares of stock held by the Bank in Escrow because 5410 Connecticut Ave., Corporation owned the shares of stock according to the writings in possession of the Riggs Bank. Mr. Bankin inquired if it were possible to get a release of the stock from 5410 Connecticut Ave., Corporation and my husband expressed no hope in doing so. Mr. Bankin told my husband that he, as agreed, would do anything to get the shares of stock and place them into the hands of my husband. Mr. Bankin asked my husband to meet him in Washington, D.C. and to bring with him a copy of the rescission agreement that was prepared for Mr. Benn's signature. Mr. Bankin



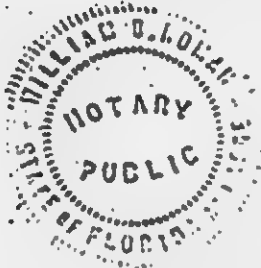
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instructed my husband to place the said rescission agreement on the desk, in a very conspicuous place, in order that Mr. Sankin could easily notice it while several persons would be available or nearby as witnesses. Mr. Sankin stated to my husband that he would pretend that he learned then, at their next proposed meeting, for the first time the contents of the rescission agreement. Mr. Sankin cautioned my husband not to reveal to anyone that Mr. Sankin already had, in his possession, a copy of the said unsigned rescission agreement.

7) The incomplete testimony with respect to;

THE NONEXISTENT PERSONAL RELATIONSHIP BETWEEN YOUR AFFIANT AND MR. BENN AND HER UNFORTUNATE CHOICE OF WORDS WERE MISCONSTRUED IS WELL KNOWN TO YOUR AFFIANT AND HER HUSBAND. THIS ISSUE WAS CREATED TO OFFSET THE DISADVANTAGES OF HIS JUDICIAL ADMISSION.

See Verdict
The sole purpose for introducing this fictitious personal relationship in this case between your Affiant and Mr. Benn is because my husband admitted in open Court, before Honorable Judge Pine, United States District Court for the District of Columbia on June 5, 1959, that his actions were fraudulent and that my husband schemed to deprive and defraud Mr. Sankin of his rights under the May 1, 1958 Stockholder Agreements. My husband informed your Affiant that because the Riggs National Bank refused to deliver to Mr. Sankin the 66 2/3 shares of stock issued by each of the two corporations, Garfield and Sankin, Inc. and Julius Sankin, Inc., that he (my husband) would have to confess to the Court that he perpetrated a fraud against Mr. Sankin in order to influence the Court to issue the injunction, thereby making Mr. Sankin an innocent party who has been deprived of his rights, where as a matter of fact, Mr. Sankin had full knowledge of the agreement reached between my husband and Mr. Mankes as of May 8, 1959 and everything my husband did thereafter. Because of my husband's said confession it became necessary to get the Court's sympathy and to rehabilitate my husband before the Court is really why this fictitious issue was introduced. After several days of discussion my husband prevailed over your Affiant and induced your Affiant to agree to testify against Mr. Benn in such a way as to influence the Court to believe that an illicit relationship had existed between your Affiant and Mr. Benn. Your Affiant agreed to so testify and my husband promised that in exchange for such testimony he would assign to your Affiant all of his interests in and to the Garfield Apartment Building, 5410 Connecticut Ave. N.W., Washington D.C. which he voluntarily reaffirmed after the trial of this case. My husband well knew that there were no improper relations between your Affiant and James T. Benn, nevertheless, your Affiant agreed with her husband to claim an illicit relationship had existed between

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your Affiant and Mr. Benn and, even a proposal of marriage, all of which was not true as both your Affiant and her husband well knew, but was stated to be true solely for the purpose of getting the sympathy of the Court for my husband. At all times, since my husband first introduced your Affiant to Mr. Benn he has been courteous, considerate and respectful as would be usual between a gentleman and a lady and nothing beyond that. When your Affiant used the word "amour" in her testimony she did not intend to convey any idea of an improper or illicit relationship but her testimony has been so construed, where in fact no wrongdoing or improper relationship ever existed between your Affiant and Mr. Benn and my husband well knew that none ever existed. This device was used in order to get the Court's sympathy because of the disadvantage Mr. Garfield was placed when it became necessary for him to admit his alleged attempt to defraud Mr. Sankin solely because the Riggs National Bank on May 27, 1959, refused to deliver the escrowed stock to Mr. Sankin for my husband.



8) The incomplete testimony with respect to;

MR. GARFIELD REAFFIRMED HIS PROMISE ON DECEMBER 25, 1964 TO CONVEY TO YOUR AFFIANT ALL OF HIS RIGHTS, TITLE AND INTERESTS IN AND TO MY HUSBAND'S SHARE IN THE GARFIELD APARTMENT BUILDING, INCLUDING ALL PROCEEDS AND BENEFITS. YOUR AFFIANT RESPECTFULLY REQUESTS THAT SUCH BE DECREED BY THIS COURT AND SAME VESTED IN THE NAME JANET GARFIELD.

Janet Garfield

My husband promised to convey to your Affiant all of his rights and interests in and to the Garfield Apartment Building on or about May 8, 1959. He reaffirmed this many times thereafter and also reaffirmed again his promise on Christmas Day, December 25, 1964, after your Affiant's testimony before the Court. All of Mr. Garfield's rights and interests and all proceeds and benefits belongs to your Affiant and this Court is respectfully prayed to vest same in your Affiant.

Janet Garfield

Before me personally appeared Janet Garfield, known to me, who Subscribed and Swore that the foregoing five pages of Affidavit was done freely and voluntarily, and acknowledged to me this Act and Deed this ____ day of June, 1967.

My Commission expires:

Notary Public

car 11/27/68

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EXCHANGE AGREEMENT

THIS EXCHANGE AGREEMENT made this 4th day of May, 1959, by and between 5410 CONNECTICUT AVE. CORPORATION, a District of Columbia corporation, sometimes hereinafter referred to as PURCHASER, and JOSEPH A. GARFIELD, sometimes hereinafter referred to as SELLER;

W I T N E S S E T H:

WHEREAS, heretofore and on or about March 14, 1959, the parties hereto (PURCHASER and SELLER) entered into a Stock Purchase Agreement as more particularly set forth in said agreement dated March 14, 1959, which said agreement is made a part hereof by reference; and

WHEREAS, heretofore and on or about April 21, 1959, the parties hereto (PURCHASER and SELLER) entered into a Stock Purchase Agreement as more particularly set forth in said agreement dated April 21, 1959, which said agreement is made a part hereof by reference; and

WHEREAS, the PURCHASER (5410 Connecticut Ave. Corporation) has heretofore made and executed three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00) in favor of the SELLER (Joseph A. Garfield), which said three (3) promissory notes represent the total consideration in connection with the purchase of certain stock certificates issued by Garfield and Sankin, Inc., and Julius Sankin, Inc., both District of Columbia corporations; and

WHEREAS, the SELLER desires to exchange his right, title and interest in and to the above three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00), for two thousand (2,000) shares of no par value bearer common Voting stock issued by International Timber Corporation, a

WHEREAS, the PURCHASER desires to exchange with the SELLER the said two thousand (2,000) shares of non par value bearer common voting stock issued by International Timber Corporation for the SELLER's right, title and interest in and to the said three (3) promissory notes upon the terms and conditions as hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and covenants and agreements hereinafter set forth, the parties hereto do covenant and agree as follows:

1. SELLER agrees to exchange his right, title and interest in and to the said three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00) for two thousand (2,000) shares of no par value bearer common voting stock issued by International Timber Corporation, a Panamanian corporation;

2. SELLER has this day made and executed a Joint Letter of Authorization, authorizing and directing The Riggs National Bank (Escrow Agent), Trust Department, Washington, D. C., to deliver or cause to be delivered the said three (3) promissory notes, marked "Cancelled," and dated, to 5410 Connecticut Ave. Corporation, attention of Benjamin H. Saunders, Esq., 1000 Shoreham Building, Washington, D. C., for which the SELLER has acknowledged receipt of said shares of stock as set forth in paragraph one (1) herein as full, total and complete payment for the above three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00).

3. PURCHASER represents that the assets of International Timber Corporation, a Panamanian corporation, are as follows:

A. Said corporation is the sole and unqualified owner of fifty per cent (50%) by assignment of a lawful, valid and

subsisting timber concession from the Government of Surinam, for the taking, during a period of ten (10) years, of logs, timber, lumber, etc., from an area described in said concession, dated Paramaribo, August 15, 1958, Department of Development, Bureau LA. D No. 2061, under which said concession the Government of Surinam has further agreed to make available to the concessionaire (Surinam American Timber Corporation, a Surinam corporation), a minimum of two hundred fifty thousand (250,000) board feet of standing timber per day in the event said ten (10) year concession proves insufficient to produce on a sustained basis enough logs, timber, lumber, etc., to meet the exploitation, sales and markets of said concessionaire. The timber presently standing covered by said above concession No. 2061, dated August 15, 1958, granted by the Government of Surinam to Surinam American Timber Corporation, is estimated to be not less than five billion (5,000,000,000) board feet of various species, as per survey conducted by the Department of Forestry, Yale University, U. S. A.

B. Said corporation owns the following assets by assignment:

International Timber Corporation shall receive the sum of Two Dollars Fifty Cents (\$2.50) for each and every one thousand (1,000) board feet of log, timber, lumber, etc., sold by or through the concessionaire, Surinam American Timber Corporation, and/or International Timber Corporation. Said sum of Two Dollars and Fifty Cents (\$2.50) per one thousand (1,000) board feet is payable at such time as Surinam American Timber Corporation accepts a contract for sale.

C. Said corporation has been assigned all of James T. Benn's right, title and interest in and to the proposed contract with Tectum Corporation, Columbus, Ohio, as more generally set forth in Tectum Corporation's letter to James T. Benn, dated September 29, 1958.

D. JAMES T. BENN, acting for and on behalf of 5410 Connecticut Ave. Corporation, does hereby agree that any and all contacts in connection with the exploitation, sale, or merchandising or use of logs, timber, lumber, wood pulp, etc., and any and all allied and complimentary products thereto, shall be turned over to Joseph A. Garfield without further remuneration or consideration.

4. It is agreed by all of the parties hereto that this agreement contains all the representations, obligations and liabilities of the respective parties ~~and the parties hereto~~

IN WITNESS WHEREOF, the parties hereto have set their respective hands and seals this 4th day of May, 1959.

5410 CONNECTICUT AVE. CORPORATION

By:

James T. Benn
James T. Benn, President

Signed, sealed and delivered in the presence of:

Joseph A. Garfield
JOSEPH A. GARFIELD

Edna S. Dorney
STATE OF FLORIDA)
COUNTY OF DADE) SS:

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, JAMES T. BENN as President of 5410 Connecticut Ave. Corporation, and JOSEPH A. GARFIELD individually, to me well known to be the persons described in and who executed the foregoing Exchange Agreement, and acknowledged before me that they executed the same freely and voluntarily for the purpose therein expressed. WITNESS my hand and official seal at Miami, Dade County, Florida, this 4th day of May, 1959.

Edna S. Dorney
Notary Public, State of Florida at Large.
My Commission Expires July 9 1960.
Bonded by American Surety Co. of N. Y.

177

Miami, Florida,
May 4, 1959

RECEIPT FOR STOCK CERTIFICATE

RECEIVED from JAMES T. BENN, acting for and on behalf of 5410 Connecticut Ave. Corporation, a District of Columbia Corporation, one (1) stock certificate representing two thousand shares of non-par value bearer common voting stock issued by International Timber Corporation, a Panamanian corporation.

The undersigned acknowledges receipt of said above two thousand (2,000) shares of stock which has been accepted by the undersigned in exchange for three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00); payor of said notes, 5410 Connecticut Ave. Corporation; payee of said notes, Joseph A. Garfield.

Further, the undersigned, Joseph A. Garfield, accepts the above stock certificate in exchange for the said three (3) notes and does hereby and herein acknowledge receipt of the said shares of stock as full, total and complete payment of the above three (3) promissory notes as more particularly set forth in the Joint Letter of Authorization to the Escrow Agent, The Riggs National Bank, Washington, D.C., dated May 4, 1959, and as set forth in the Exchange Agreement dated May 4, 1959, by and between 5410 Connecticut Ave. Corporation, a District of Columbia corporation, and Joseph A. Garfield.

Signed, sealed and delivered
in the presence of:

JOSEPH A. GARFIELD

James T. Benn
Edna S. Downey

STATE OF FLORIDA)
COUNTY OF DADE) SS:

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgements, JOSEPH A. GARFIELD, to me well known to be the person described in and who executed the foregoing Receipt for Stock Certificate, and acknowledged before me that he executed the same freely and voluntarily for the purpose therein expressed.
WITNESS MY HAND and official seal at Miami, Dade County, Florida, this 4 day of May, 1959.

Edna S. Downey
Notary Public, State of Florida at Large
My Commission Expires July 9 1962
Bonded by American Surety Co. of N. Y.

JOINT LETTER OF AUTHORIZATION

Miami, Florida,
May 4, 1959

The Riggs National Bank
Trust Department
1508 "H" St., N.W.
Washington, D.C.

Attention: Mr. Shaw and Mr. Wiegaring

Gentlemen:

You are presently holding in escrow, pursuant to Escrow Agreements dated April 8, 1959 and April 21, 1959, certain stock certificates issued by Garfield and Sankin, Inc., and Julius Sankin, Inc., and registered in the name of Joseph A. Garfield, and attached to said stock certificates are executed stock powers signed by Joseph A. Garfield in favor of 5410 Connecticut Ave. Corporation, purchasers of same.

Further, you are presently holding in escrow pursuant to said above Escrow Agreements the following promissory notes:

One (1) demand promissory note, non-negotiable, in the face amount of Sixty Thousand Dollars (\$60,000.00), dated April 8, 1959,

AND One (1) promissory note, non-negotiable, in the face amount of Five Hundred Forty Thousand Dollars (\$540,000.00), dated April 8, 1959, due and payable on or before December 1, 1959. Payee of said above two (2) notes is Joseph A. Garfield, and payor of said above two (2) notes is 5410 Connecticut Ave. Corporation, and

One (1) demand promissory note, non-negotiable, in the face amount of Two Hundred Thousand Dollars (\$200,000.00), dated April 21, 1959. Payee is Joseph A. Garfield, and payor is 5410 Connecticut Ave. Corporation.

You are hereby irrevocably authorized and directed by the undersigned to deliver or cause to be delivered the said above three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00) to 5410 Connecticut Ave. Corporation, attention of Benjamin H. Saunders, Secretary, #1000 Shorham Building, Washington, D. C. All of the above three (3) promissory notes shall be MARKED "CANCELLED," AND DATED.

5-4-59

For your record, please be advised that Joseph A. Garfield, payee of said above three (3) promissory notes, has this day received, from James T. Benn acting for and on behalf of 5410 Connecticut Ave. Corporation, payor of said above three (3) promissory notes, two thousand (2,000) shares of no par value bearer stock of INTERNATIONAL TIMBER CORPORATION, in exchange for Joseph A. Garfield's right, title and interest in and to the said three (3) promissory notes, for which the payee named herein has this day acknowledged receipt of said shares of stock as full, total and complete payment of the above three (3) promissory notes in the aggregate sum of Eight Hundred Thousand Dollars (\$800,000.00).

In connection with the responsibilities hereunder, it is expressly understood and agreed by the undersigned that paragraph 6 of the Escrow Agreements dated April 8, 1959 and April 21, 1959, be made a part and parcel of this Joint Letter of Authorization as though said paragraph 6 were fully set forth herein.

Very truly yours,

Joseph A. Garfield
JOSEPH A. GARFIELD

5410 CONNECTICUT AVE. CORPORATION

By: James T. Benn
James T. Benn, President

Signed, sealed and
delivered in the
presence of:

Joseph A. Garfield
Edna S. Downey

STATE OF FLORIDA)
COUNTY OF DADE) SS:

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, JOSEPH A. GARFIELD individually and JAMES T. BENN as President of 5410 Connecticut Ave. Corporation, to me well known to be the persons described in and who executed the foregoing Joint letter of Authorization, and acknowledged before me that they executed the same freely and voluntarily for the purpose therein expressed.
WITNESS my hand and official seal at Miami, Dade County, Florida, this 4th day of May, 1959.

Edna S. Downey
Notary Public, State of Florida at Large

1 TAX COURT OF THE UNITED STATES
2 WASHINGTON

11
recd
1966 OCT 7 PM 4 54

3 JAMES T. BENN,

4 Petitioner,

TAX COURT
OF THE
UNITED STATES

5 -against-

: Docket No. 235-66

6 COMMISSIONER OF INTERNAL REVENUE,

:

7 Respondent.

:

8 ----- X

9
10 110 East 42nd Street
11 New York, New York
August 31, 1966
11:30 o'clock A. M.

12 Deposition of FREDERICK SILVER, taken by

13
14 Petitioner, pursuant to Order of John E. Mulroney, Justice,
15 dated April 27, 1966, before Frank T. Read, a notary public
16 of the State of New York, and held at the above-stated time
17 and place.

18 APPEARANCES:

19 JOHN GLANDON DAVIES, Esq.
20 Attorney for Petitioner
21 538 Pennsylvania Building
Washington, D. C. 20004

22 SOMMERS T. BROWN, Esq.
23 Attorney for Internal Revenue Service
24 12th and Constitution Avenue
25 Washington, D. C.

1 FREDERICK SILVER, the Witness, having first been duly sworn by
2 a notary public of the State of New York, testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. DAVIES:

6 Q What is your name, sir?

7 A Frederick Silver.

8 Q Where do you live?

9 A 21 North Chatsworth Avenue, Larchmont, New York.

10 Q Mr. Silver, would you state your profession,
11 please?

12 A I am an attorney.

13 Q Would you give us your business address, please?

14 A 110 East 42nd Street, New York City.

15 Q Have you ever represented, in your capacity as an
16 attorney, the petitioner in this case, Mr. James T. Benn?

17 A I have, yes, sir.

18 Q Do you still now represent him?

19 A No.

20 Q Can you tell us, sir, if you can recall, when you
21 ceased to represent him?

22 A I believe the latter part of 1959, perhaps around
23 October.

24 Q Mr. Silver, I would like to direct your attention
25 to the month of May, 1959, please, sir.

1 Do you recall an occasion during that month when you
2 received a telephone call from Mrs. Janet Garfield?

3 A I do.

4 Q Would you state for us, sir, the substance of your
5 conversation with Mrs. Garfield?

6 MR. BROWN: May I interpose an objection at
7 this point to all further questions relating to any
8 conversations with the alleged Mrs. Garfield, on the
9 basis of the foundation that has been laid being
10 insufficient for anything more than hearsay.

11 MR. DAVIES: Answer the question, Mr. Silver.

12 THE WITNESS: What was the question?

13 (The reporter read the pending question.)

14 A Yes, I did receive a telephone conversation from
15 a woman who said she was Mrs. Janet Garfield, and that she
16 was calling from Miami, Florida.

17 Q Would you state for us, sir, the conversation which
18 ensued, the substance of it?

19 A She asked me whether Mr. Benn is in New York City.
20 And I said, to my knowledge, I did not think so.

21 She said that she would very much like to reach him.

22 And I replied I would do my best to let him know.

23 Then, she told me that she had some personal things that
24 she would like to take the liberty to talk to me about. She
25 mentioned that she knew that I had represented Mr. Benn, and

1 that I had been a close friend of his for a number of years,
2 and asked me if it would be all right to talk to me.

3 I said, well, really, I don't like to invite
4 conversation, but I listen; if there is anything I can do,
5 I will gladly do my best to try,

6 She told me that she had been friendly with Mr. Benn, and
7 that she had in mind a very much closer relationship, even
8 marriage, and that certain things have happened that is
9 making it very difficult for her, and she did not want to
10 spoil things.

11 And I kept listening. She went on with her tale, and
12 told me that on one occasion, which I gathered from her
13 conversation must have been within the time, perhaps, a few
14 days of the date when she called me, Mr. Benn had been in
15 her home, and that he had a briefcase with him, and there
16 were some differences between her husband and her and Mr. Benn;
17 and she took the briefcase, and hid it, not intending to keep
18 it; but that she wanted to force Mr. Benn to return some
19 papers that had something to do with a Washington apartment
20 house. And when she opened the briefcase, she found that its
21 contents were one hundred twenty thousand dollars in U. S.
22 currency, in one hundred dollar denominations.

23 She did not have any intention to retain it. She wanted
24 to force Mr. Benn to return those papers or whatever it is
25 that she wanted from him.

1 Then, she mentioned that after some conversations
2 between them, she had returned sixty thousand dollars of that
3 one hundred twenty thousand dollars, and was retaining the
4 remaining sixty thousand dollars, together with some papers in
5 the briefcase, until he would return those papers. And I
6 believe she mentioned that there were some stock certificates
7 that were to be returned to her and her husband.

8 Then, she started crying, and I just kept silent, and
9 she said that she had been with Mr. Benn in an automobile
10 somewhere locally in Miami all through the night, talking
11 and talking and talking, and it wasn't until about six o'clock
12 in the morning the following day that he left her ostensibly
13 to go to New York. At least, this is what she said he told
14 her; and that is why she called me in New York, expecting
15 that he might be visiting me, and she did want to reach him.

16 And the talk was all about the future, and her
17 expecting to leave her husband. And by that time, I thought I
18 had heard enough, and I told her: "Mrs. Garfield, what you are
19 telling me is of a highly personal nature. You shouldn't be
20 doing that. You have a husband. Have you talked to your
21 husband about these things? Does he know?"

22 "Well, he knows certain things, but not everything."

23 I said: "Why don't you do that? Why don't you talk to
24 him? You just don't leave husbands that way. You have a
25 child, or children, don't you?"

1 "Yes." I think she said she had a child.

2 I said: "Well, for heaven's sake, don't go further
3 with me. I think you would be well advised to stop here."

4 But Mrs. Garfield wouldn't stop. She kept on talking
5 about not wanting to spoil their relationship, and looking forward
6 to a much closer relationship with Mr. Benn, and she did not
7 want to hurt her husband financially, and that Mr. Benn should
8 return whatever it is that she mentioned to me at the outset.

9 I implored Mrs. Garfield: "I am asking you to stop."
10 But she was in a crying state from time to time.

11 Well, it was a lengthy conversation. I judge that
12 it lasted nearly an hour, and it was just a rehashing of this
13 personal stuff that she had mentioned to me previously.

14 Toward the very end, I told her that if Mr. Benn will
15 get in touch with me, whether he is in New York or anywhere
16 else, I will relate to him what she said, and ask him to get
17 in touch with her.

18 That is in substance what happened.

19 Q Mr. Silver, then, from what you have said, would
20 it be correct to state that she made no reference to any
21 present intention at that time to return the sixty thousand
22 dollars?

23 A My recollection, definitely, from that conversation
24 is that she was still retaining it at that time, that Mr. Benn
25 had talked with her through the night, and the situation

1 remained the same, that the money was still in her possession.

2 That is the definite interpretation that I had.

3 Q Mr. Silver, I would like you to recall carefully,
4 if you can, sir, the date in May of 1959, the day on which this
5 conversation with Mrs. Garfield took place.

6 A Well, I have had an opportunity by now to fix it in
7 my mind, so I know that it is May 13th.

8 Q May 13th?

9 A 1959.

10 Q Could you tell us, sir, what time of the day,
11 approximately?

12 A My recollection, sir, is the afternoon. It could
13 not have been too late in the afternoon.

14 Q Mr. Silver, prior to that telephone conversation,
15 had you had any contact with Mrs. Garfield?

16 A Never. Never talked with her, never saw her.

17 Q What about her husband, Joseph Garfield?

18 A Never saw him, never talked with him.

19 Q Had you ever had any occasion in conversations
20 with Mr. Benn to be familiar with the situation to which her
21 conversation related?

22 A I want to make sure of that question again. Would
23 you repeat it?

24 (The reporter read the last question.)

25 A No, not in the least.

1 Q Not in the least?

2 A No.

3 Q Have you had any subsequent contact with Mrs.
4 Garfield since this telephone conversation?

5 A Now, my recollection is that sometime after May
6 13, 1959, she probably did call the office here, and
7 that I had talked with her. Now, if I am right in this, it
8 was a very brief conversation, and it was only in connection
9 with ascertaining whether Mr. Benn was in New York or I had
10 heard from Mr. Benn; and my answer would have been definitely,
11 no.

12 Q In the subsequent conversation, which you feel
13 may have taken place, was any reference made to the status
14 of the sixty thousand dollars?

15 A No, nothing at all.

16 Q Mr. Silver--

17 A (Continuing) If there was that second conversation
18 and the idea lingers in my mind that there was a conversation,
19 it must have taken place just about probably a few days after
20 the 13th of May, 1959.

21 Q Has any information or any facts come to your
22 attention since that date, Mr. Silver, which would lead you to
23 know whether this sixty thousand dollars has been returned to
24 Mr. Benn?

25 A No.

Q As far as you know, it has not been?

A No, I would have no knowledge of that from Mr. Benn or any other source.

Q This conversation on the 13th of May between you and Mrs. Garfield, other than to relate the circumstances surrounding her relationship with Mrs. Benn, were any other topics covered concerning Mr. Benn?

A My answer would be that by far, the most of the conversation, I would say nearly all of it was of that highly personal nature, having to do with her express intentions of leaving her husband and that there was this expectation of marrying Mr. Benn, and it was all on that order, all of it, personal.

Q Did any part of this--

A (Continuing) And I begged her during the time to please realize that I am a stranger in this situation, that it isn't fair for her to go on this way, it isn't even fair to me. I didn't want to cut her off, and I just was dumbfounded listening to this whole thing, but I didn't want to be rude about it, and if there was any development here where there would be a marriage, Mr. Benn was still my client at that time, and I didn't want to do anything to jeopardise that situation, too.

So, I listened and listened. That's the way it ended,
after an hour.

Q Did any part of this conversation concern Mr. Benn's

1 plans in connection with his present wife, the former
2 Margaret Bland?

3 A None.

4 Q Did you ever have any conversation with Mrs.
5 Garfield concerning Margaret Bland?

6 A Never.

7 MR. DAVIES: I have nothing further.

8 CROSS-EXAMINATION

9 BY MR. BROWN:

10 Q Mr. Silver, are you the Frederick Silver, who
11 executed a statement, sworn before a notary public, relating to
12 these incidents on the 5th day of June, 1959?

13 A Yes, I did.

14 THE WITNESS: Do you mind if I take a look at
15 that?

16 MR. BROWN: Not at all.

17 Q I understand you were practicing law at that
18 time?

19 A I have always been practicing law for over forty
20 years.

21 Q But at that time, you were not acquainted with
22 Mr. or Mrs. Garfield in any way whatsoever?

23 A No.

24 Q But at that time, you were representing Mr. Benn,
25 is that right?

1 A Yes, on occasion. You see, Mr. Benn's activities
2 were not in New York, and it was only in connection with
3 infrequent trips that he made here that he would see me, and
4 at times, talk with me about certain things, but I wasn't
5 what you would call his sole counsel. He had other attorneys,
6 but his activity was really not in New York.

7 Q Do you have any personal knowledge of the
8 occurrences about which you have been speaking?

9 A No, none whatever, excepting what was related
10 to me by Mrs. Garfield then.

11 Q And you, as I understand it, are not even certain
12 that it was Mrs. Garfield with whom you spoke?

13 A Excepting that she said she was Mrs. Janet Garfield
14 and giving me her story.

15 Q Did you make any notes at the time of that
16 conversation?

17 A No, I did not.

18 Q Can you tell me how it was that you are able now
19 to recall the exact date?

20 A Because as I said before, I had been shown that
21 affidavit previously over the years. Mr. Davies had talked with
22 me about it on the phone, and asked me if I would arrange to
23 give my deposition in Washington, and I had the opportunity to
24 fix it in my mind, so that I know it was May 13th.

25 Q But there are no written notes, or there is no

1 written record that you have, upon which you have relied, is
2 there?

3 A No.

4 Q With respect to that statement, and I assume it
5 was a statement that you just saw, that you referred to, when
6 you spoke about an affidavit?

7 A Yes.

8 Q Would you tell us the circumstances giving rise to
9 your execution of that statement?

10 A Yes.

11 Q Would you give us the circumstances surrounding
12 your execution of that statement?

13 A I had not seen Mr. Benn, nor heard from him until
14 about the date of the affidavit; that was June 5th. About
15 June 5, 1959. It might have been a day before, but Mr. Benn
16 had been in New York at that time, and I related to him what
17 had happened with Mrs. Garfield's telephoning me.

18 Q Did Mr. Benn ask you to prepare the statement?

19 A Well, now, I want to make one thing clear. I want
20 to give you an answer to the question, but you know, we are
21 all attorneys, and you realize that I represented Mr. Benn at
22 that time. Even if I would want to answer anything in
23 connection with conversations that Mr. Benn had with me, I
24 feel strongly that I would have no right to.

25 However, your question, as I understand it, is a simple

1 one, and not wanting to be misunderstood that I am relating
2 a conversation between a client and myself, which I have no
3 right to do, even if I would want to, I would say he asked me
4 to prepare the affidavit.

5 Q Then, do I understand that you did prepare it?

6 A I did prepare it, yes.

7 Q I believe you said that it was prepared either
8 on the 5th of June, 1959, or possibly the day before, is that
9 correct?

10 A The request of me to furnish an affidavit might
11 have been made a day before or on the 5th of June, 1959. I'm
12 not sure whether it was made on that day, but it certainly
13 couldn't have been made sooner than a day before.

14 Q But it was signed by you before the notary public
15 on the 5th of June?

16 A That's right.

17 Q And it appears that her name is Teresa Rowley?

18 A Yes, that's right.

19 Q Was she employed by you at the time?

20 A No. My recollection is that it was rather late
21 on the 5th of June, and there was no one in my office at the
22 time that could accommodate me in taking my affidavit, so I
23 think we went across to the Commodore Hotel, which is that
24 building I am pointing to here; and on the main floor, there
25 is a notary public, and I believe that the Rowley name is--she

United States District Court for the District of Columbia

Julius Sankin

Plaintiff.

James T. Benn *et al.*

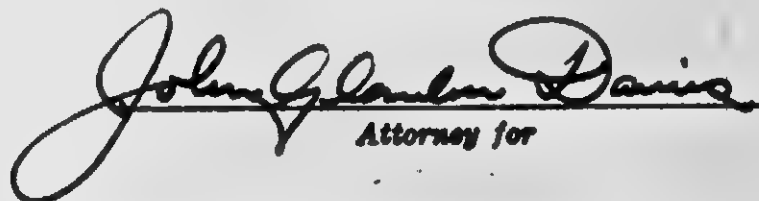
Defendant.

CIVIL No. 1493-59

NOTICE OF APPEAL

Notice is hereby given this 29th day of February, 19⁶⁸, that
James T. Benn

hereby appeals to the United States Court of Appeals for the District of Columbia from the
judgment of this Court entered on the 1st day of February, 19⁶⁸
in favor of Julius Sankin
against said James T. Benn


Attorney for

COPY TO:

Benjamin W. Dulany, Esq., 822 Southern Building, Washington, D.C.
John A. Beck, Esq., 605 Southern Building, Washington, D.C.
Edward L. Genn, Esq., 514 Colorado Building, Washington, D.C.
Vail W. Pischke, Esq., 210 Little Falls Street, Falls Church, Va.
Joseph Pardo, Esq., Pro se, 609 City National Bank Building, Miami, Fla.
Bernard S. Cohen, Esq., 110 North Royal Street, Alexandria, Va.

United States District Court for the District of Columbia

James T. Benn

Plaintiff.

vs.

Joseph A. Garfield

Janet A. Garfield

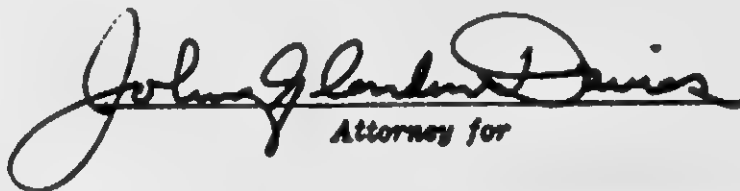
Defendant.

CIVIL No. 4002-60

NOTICE OF APPEAL

Notice is hereby given this 29th day of February, 19 68, that
James T. Benn

hereby appeals to the United States Court of Appeals for the District of Columbia from the
judgment of this Court entered on the 1st day of February, 19 68
in favor of Joseph A. Garfield and Janet A. Garfield
against said James T. Benn


Attorney for

COPY TO:

Benjamin W. Dulany, Esq., 822 Southern Building, Washington, D.C.
John A. Beck, Esq., 605 Southern Building, Washington, D.C.
Edward L. Genn, Esq., 514 Colorado Building, Washington, D.C.
Vail W. Pischke, Esq., 210 Little Falls Street, Falls Church, Va.
Joseph Pardo, Esq., Pro se, 609 City National Bank Building, Miami, Fla.
Bernard S. Cohen, Esq., 110 North Royal Street, Alexandria, Va.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN,

0

Plaintiff.)

Civil No. 1493-59

vs.)

5410 CONNECTICUT AVE. CORP' .)
et al.,

Defendants.)

NOTICE OF APPEAL

Notice is hereby given this 6th day of March, 1968, that

JOSEPH PARDO

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered and dated the 18th day of January, 1968, and Order Denying Petition for Rehearing and/or New Trial dated February 1, 1968 in favor of Julius Sankin against said Joseph Pardo.


JOSEPH PARDO, Defendant

Pro se

609 City National Bank Bldg.,
Miami, Florida

COPY TO:

William H. Deck, Esq. 425 - 13th Street, N. W. Washington, DC,
Benjamin W. Dulany, Esq. 822 Southern Bldg., Washington, D.C.
John A. Beck, 605 Southern Bldg., Washington, D.C.
Edward L. Genn, Esq. 514 Colorado Bldg., Washington, D.C.
Bernard S. Cohen, Esq. 110 North Royal Street, Alexandria, Va.
Vail W. Pischke, Esq. 210 Little Falls Street, Falls Church, Va.

J.A. 140 C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES T. BENN
7820 Southwest 112th Street,
Miami, Florida,

Plaintiff,

v.

JANET GARFIELD,
6510 Grenada Boulevard,
Coral Gables, Florida,

Defendant.

Civil Action No. 4002-60

ANSWER OF DEFENDANT JANET GARFIELD
TO COMPLAINT
First Defense

The complaint fails to state a cause of action for which relief can be granted.

Second Defense

1. The defendant admits the allegations contained in paragraph 1 of the complaint.
2. Answering paragraph 2 of the complaint, the defendant admits that James T. Benn is a citizen of the United States but denies that he is a resident of the State of Florida. The defendant admits that she is a citizen of the United States and a resident of the State of Florida.
3. Answering paragraph 3 of the complaint, the defendant admits the allegations of paragraph 3 of the complaint, except that she denies that the brief case was "stolen" by the defendant or her husband.
4. Answering paragraph 4 of the complaint, the defendant avers that on or about May 9, 1959, she returned said brief case to the plaintiff and states that she also returned to the plaintiff the sum of \$120,000 in cash (rather than "\$60,000") as alleged in the complaint.

5. The defendant denies the allegations contained in paragraph 5 of the complaint.

/s/ Edmund D. Campbell

Edmund D. Campbell

/s/ Benj. W. Dulany

Benj. W. Dulany
822 Southern Building
Washington 5, D. C.
Attorneys for Defendant

DOUGLAS, OBEAR & CAMPBELL

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 1961, I mailed, postage prepaid, a copy of the foregoing and annexed Answer to David C. Eastian, Esquire, Attorney for the Plaintiff, 866 National Press Building, Washington 4, D. C.

/s/ Benj. W. Dulany

Benj. W. Dulany

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN,

Plaintiff,

vs.

Civil Action No. 1493-59.

5410 CONNECTICUT AVENUE CORPORATION
a District of Columbia corporation,
et al.,

Defendants.

ANSWER TO COMPLAINT, ANSWER TO CROSS-CLAIM
AND CROSS-CLAIM OF DEFENDANT JAMES T. BEHN

CROSS-CLAIM

For his cross-claim against the defendant Joseph A. Carfield, this defendant states as follows:

1. That on or about May 8, 1959, while as an invited guest in the home of the cross-claimant Carfield and his wife, one Janet Carfield, located in Coral Gables, Florida, a briefcase belonging to this defendant and containing, inter alia, \$120,000.00 in cash was stolen from this defendant by the said cross-claimant and his said wife.

2. That on or about May 9, 1959, the said cross-claimant and his said wife returned to this defendant the sum of \$60,000.00.

3. Although requested so to do by this defendant, the said cross-claimant and his said wife have failed and refused to return to this defendant the balance of the monies taken from him as hereinbefore set forth, and there is now due this defendant from the cross-claimant the sum of \$60,000.00.

WHEREFORE, this defendant demands judgment against the cross-claimant Joseph A. Garfield in the sum of \$40,000.00 with interest from May 8, 1959.

/s/ James T. Benn

James T. Benn

/s/ David C. Bastian

David C. Bastian
Attorney for Defendant
James T. Benn
866 National Press Building
Washington 4, D. C.
National 8-0055.

DISTRICT OF COLUMBIA, ss:

James T. Benn, being first duly sworn, on oath deposes and says: I have read the foregoing Answer to Complaint, Answer to Cross-Claim and Cross-Claim subscribed by me, and know the contents thereof; the matters and things set forth therein are true as I verily believe; that the cross-claimant Joseph A. Garfield is justly indebted to me in the sum of \$40,000.00, as set forth herein in the above Cross-Claim.

/s/ James T. Benn

James T. Benn

Subscribed and sworn to before me this 18th day of
November, 1960.

/s/ Marjorie Young

Notary Public, D. C.

(SEAL)
My Commission expires
February 14, 1963.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Answer to Complaint, Answer to Cross-Claim and Cross-Claim was mailed,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SARKIN,

Plaintiff.

vs.

Civil Action No. 1493-59

5410 CONNECTICUT AVENUE CORPORATION
a District of Columbia corporation,
et al,

Defendants.

ANSWER OF DEFENDANT JOSEPH A. GARFIELD
TO CROSS-CLAIM OF DEFENDANT JAMES T. BENN

FIRST DEFENSE

The cross-claim of defendant James T. Benn does not state
a claim from which relief may be granted.

SECOND DEFENSE

This defendant denies the allegations contained in para-
graphs 1, 2 and 3 of the cross-claim.

/s/ Edmund D. Campbell

Edmund D. Campbell

/s/ Benj. W. Dulany

Benj. W. Dulany
822 Southern Building,
Washington 5, D. C.
Attorneys for Defendant
Joseph A. Garfield

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES T. BENN,

Plaintiff,

v.

JANET GARFIELD,

Defendant.

Civil Action No. 4002-'60

JULIUS SANKIN,

Plaintiff,

v.

5410 CONNECTICUT AVENUE CORP.
a District of Columbia
corporation, et al.,

Defendants.

Civil Action No. 1493-'59

ORDER CONSOLIDATING ACTIONS

Upon consideration of the motion filed herein by James T. Benn, the plaintiff in Civil Action No. 4002-'60 ("James T. Benn, Plaintiff, v. Janet Garfield, Defendant") and a defendant in Civil Action No. 1493-'59 ("Julius Sankin, Plaintiff, v. 5410 Connecticut Avenue Corporation, et al., Defendants") to consolidate the two aforesaid actions, and it appearing that no opposition thereto has been made, it is by the Court this 22nd day of December, 1961,

ORDERED, that the two said civil actions, Civil Action No. 4002-'60 ("James T. Benn, Plaintiff, v. Janet Garfield, Defendant") and Civil Action No. 1493-'59 ("Julius Sankin, Plaintiff, v. 5410 Connecticut Avenue Corporation, et al., Defendants") be and the same hereby are consolidated.

51 Julius Sankin
JUDGE

By the ensigning hereof
the undersigned James T. Benn
release and relinquish Janet
Garfield from any and all
claims that I may have
against her by virtue of
my certain brief case —

All the contents therein
have been returned

\$100.00 James T. Benn

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN,

Plaintiff,

vs.

Civil Action No. 1493-59

5410 CONNECTICUT AVENUE CORPORATION,
a District of Columbia corporation,

JAMES T. BENN,

JOSEPH A. GARFIELD,
6510 Grenada Boulevard,
Coral Gables, Florida,

BENJAMIN H. SAUNDERS,

et als.,

Defendants

ANSWER AND CROSS-CLAIM OF DEFENDANT
JOSEPH A. GARFIELD

The defendant Joseph A. Garfield files this his sworn answer to the complaint and his cross-claim herein and says:

I

ANSWER

1 through 10, inclusive. This defendant admits the allegations of paragraphs 1 through 10, inclusive, of the complaint.

11, 12. Answering paragraphs 11 and 12 of the complaint, this defendant admits that on May 1, 1958, the plaintiff and this defendant, who was then the owner of 66-2/3 shares, representing two-thirds of the authorized and outstanding capital stock of Garfield & Sankin, Inc. and Julius Sankin, Inc., entered into two stockholders' agreements, copies of which are attached to the complaint as Plaintiff's Exhibits "A" and "B". This defendant re-

fers to said exhibits for a more particular statement of the terms of said agreements.

13, 14. Answering paragraphs 13 and 14 of the complaint, this defendant admits that on April 21, 1959, this defendant signed and sent to the plaintiff the notices annexed as Plaintiff's Exhibits "C" and "D", and refers to said exhibits for a statement of the provisions thereof.

15. Answering paragraph 15 of the complaint, this defendant admits the allegations thereof and avers that said representations to the plaintiff were made by the defendant Benn, pursuant to an improper arrangement between this defendant and the defendant Benn more particularly described in this defendant's Cross-Claim, infra, reference to which is hereby made.

16, 17. Answering paragraphs 16 and 17 of the complaint, this defendant is without knowledge as to the representations alleged to have been made to the plaintiff by the defendant Saunders, as referred to therein, but states that the various "agreements", "notes" and other documents mentioned in said paragraphs were actually executed, pursuant to an improper arrangement between this defendant and the defendant Benn, as more particularly referred to in this defendant's Cross-Claim, infra.

18, 19. Answering paragraphs 18 and 19 of the complaint, this defendant admits that on or about May 15, 1959, the plaintiff purported to exercise in writing his thirty day right of first purchase of any shares under the stockholder's agreements dated May 1, 1958 (Plaintiff's Exhibits "A" and "B") by offering to purchase from this defendant 16-2/3 shares of Garfield & Sankin, Inc. and 16-2/3 shares of Julius Sankin, Inc., and that a copy of plaintiff's purported exercise of his option is attached to plaintiff's complaint as Exhibit "F" thereof. This defendant is with-

out knowledge as to the purpose of plaintiff in making said proposal. This defendant denies that plaintiff's said proposal was rejected by this defendant without justification, and avers that said proposal to purchase 16-2/3 shares of each of the two corporations referred to was not in conformity with the rights reserved to the plaintiff under Plaintiff's Exhibits "A" and "B".

20. This defendant admits the allegations of paragraph 20 of the complaint.

21. Answering paragraph 21 of the complaint, this defendant admits that the plaintiff on May 26, 1959, did validly offer to buy and did validly buy all of the shares of this defendant in Garfield & Sankin, Inc. and Julius Sankin, Inc., for the total sum of \$800,000 evidenced by three promissory notes executed by the plaintiff and made payable to this defendant under the terms and conditions demanded; but this defendant denies that the plaintiff Sankin was compelled to make said offer or to buy said shares.

22. Answering paragraph 22 of the complaint, this defendant admits that the escrow agreements, stock purchase agreements, assignments and other documents purporting to transfer the interests of this defendant in Garfield & Sankin, Inc. and Julius Sankin, Inc. to "5410" were executed with the intent on the part of this defendant and the defendant Benn, the latter acting also as president of "5410", to destroy the option rights of the plaintiff to purchase the stock in Garfield & Sankin, Inc. and Julius Sankin, Inc., and to render nugatory plaintiff's stockholders' agreements with this defendant, annexed as Exhibits "A" and "B" to the complaint; and this defendant avers that it had been represented to this defendant by the defendant Benn that upon consummation of said plan the entire interest of "5410" would then be

vested in this defendant who would own 66-2/3 per cent of the capital stock of Garfield & Sankin, Inc. and Julius Sankin, Inc., free of the voting restrictions described in plaintiff's Exhibits "A" and "B". For further answer to the allegations of paragraph 22 of the complaint, this defendant refers to his cross-claim, infra.

23, 24, 25. This defendant admits the allegations of paragraphs 23, 24 and 25 of the complaint.

26. Answering paragraph 26 of the complaint, this defendant admits that at the time of the filing of the complaint, the defendant Arthur M. Chaite, who was and is a director and officer of Garfield & Sankin, Inc. and Julius Sankin, Inc., was out of this country, but avers that he has now returned. This defendant admits the remaining allegations of said paragraph.

II

CROSS-CLAIM OF DEFENDANT JOSEPH A.
GARFIELD AGAINST THE DEFENDANTS
5410 CONNECTICUT AVENUE CORPORATION,
JAMES T. BENN AND BENJAMIN H. SAUNDERS

The defendant Joseph A. Garfield files this his Cross-Claim against the defendant 5410 Connecticut Avenue Corporation (hereinafter called "5410"), James T. Benn (hereinafter called "Benn") and Benjamin H. Saunders (hereinafter called "Saunders") with respect to certain matters arising out of transactions and occurrences that are the subject matter of the original action, and shows to the court as follows:

1. During all the times herein referred to, the defendant Garfield & Sankin, Inc. was the owner of a large apartment project being constructed in the District of Columbia at 5410 Connecticut Avenue, N. W., and on which there was a temporary mortgage in the

principal sum of \$2,269,900, and a permanent Federal Housing Administration Mortgage commitment in the amount of \$2,269,900. The building on said property has been and is being constructed by Julius Sankin, Inc. for Garfield & Sankin, Inc., pursuant to appropriate FHA Regulations. In connection with the acquisition of the land for said apartment project and the construction of said building, this defendant, prior to March 1, 1959, had advanced for the account of Garfield & Sankin, Inc. and Julius Sankin, Inc. (in addition to his original stock investment of \$1333.33) moneys totaling \$190,000. Said moneys had been advanced on open account to said corporations and no part thereof has been repaid. The cash investment of the plaintiff Julius Sankin in said two corporations did not exceed \$7,000.

2. In February and March, 1959, this defendant became suspicious that the plaintiff Sankin had entered into or contemplated entering into agreements or transactions detrimental to this defendant's interests. This defendant has subsequently learned that his aforesaid suspicions of plaintiff Sankin which were deliberately provoked and fostered by the defendant Benn may well have been unfounded; but his actions hereinafter referred to, adverse to the plaintiff Sankin, were taken by this defendant because of his said suspicions which were fostered and provoked by Benn as aforesaid, and in the then belief that the suspicions were well-founded.

3. On or about March 1, 1959, this defendant expressed to his wife Janet Garfield his concern over the 50% voting rights which plaintiff had in Garfield & Sankin, Inc. and Julius Sankin, Inc. under the stockholders' agreements annexed as Exhibits "A" and "B" to the complaint, and his wish that a legal way could be found to nullify plaintiff's rights under said agreements. This defendant deemed it important at that time that said voting agree-

ments be nullified, if possible, so that this defendant would be in a position to control all of the operations of Garfield & Sankin, Inc. and Julius Sankin, Inc., and prevent further recurrences of what this defendant then feared had been improper detrimental actions on the part of the plaintiff. This defendant's wife thereupon recommended to this defendant that he confer with defendant Benn, with whom this defendant had previously had an unprofitable business dealing, but whom this defendant believed was a clever man, conversant with legal matters.

4. On March 14, 1959, this defendant met Benn by appointment at the office of one Joseph Pardo, a Miami attorney, who now claims to be a stockholder and secretary of "5410" and whom Benn had previously identified to this defendant as Benn's personal attorney. At said meeting (which took place out of the actual presence of said Pardo) this defendant asked Benn for suggestions as to possible legal means by which this defendant could nullify the apparent legal voting restrictions on this defendant's majority stock interest in Garfield & Sankin, Inc. and Julius Sankin, Inc. Benn thereupon stated to this defendant that he would like to help him in the matter and that he thought he would be in a position to offer concrete suggestions to accomplish this defendant's wishes; that he, Benn, wanted no compensation for any services that he might render this defendant in that connection because he would like to make up to this defendant for the loss which this defendant had suffered in their prior business transaction. It was thereupon agreed between this defendant and Benn at said conference that Benn would give the matter consideration as an "adviser" to this defendant, and that he would offer specific suggestions to this defendant at a subsequent conference.

5. On April 4, 1959, Benn called at this defendant's

home in Miami and stated he had some suggestions to offer which he said would nullify plaintiff's voting rights under the stockholders' agreements, attached as Exhibits "A" and "B" to plaintiff's complaint. Benn confirmed from this defendant the fact that there were no voting restrictions endorsed upon this defendant's stock certificates in Garfield and Sankin, Inc. and in Julius Sankin, Inc., and Benn thereupon stated to this defendant that under the negotiable instruments law, with which Benn said he was familiar, if a purported transfer of said stock certificates could be made to a bona fide holder, such holder would take the same free of any voting restrictions. Benn thereupon proposed to this defendant that a new "dummy" corporation be formed which would enter into a purported contract with this defendant for the purchase of this defendant's stock in Garfield & Sankin, Inc. Benn said that of course this defendant would be the real owner of this dummy corporation, although for the time being not the ostensible one. Benn asked this defendant as to the probable equity in the apartment project above the amount of the FHA mortgage commitment. This defendant replied that it would be between \$375,000 and \$400,000. Benn thereupon stated that the sale price to the new corporation for this defendant's two-third's interest in said project should be \$600,000, that being, in his opinion, a figure too high for Sankin to meet under his stock purchase option. The purchase price was to be represented by a note of the new dummy corporation which of course need not be paid.

6. Benn further advised this defendant that in order for said transaction to appear valid, it would be necessary for all of the stock in the new dummy corporation to be registered in Benn's name, and that this defendant should not publicly appear in any way as the owner thereof for the time being, but that he,

Benn, would immediately endorse and assign all of said stock in said dummy corporation to the plaintiff, who could have the same registered in his name at an appropriate later time.

7. This defendant avers that unknown to him at that time and unknown to him until on or about May 15, 1959, Benn did not ever intend to carry out his representations to this defendant or to assign and transfer to this defendant the aforesaid stock interest in the dummy corporation, but on the contrary and unknown to this defendant, schemed and planned to appropriate to his own use and benefit, through the medium of said "dummy" corporation, all of this defendant's interest in Garfield & Sankin, Inc. and in Julius Sankin, Inc., and to defraud this defendant in other ways, as hereinafter more fully set forth. This defendant, however, being ignorant of Benn's said intentions, placed complete trust and confidence in Benn and relied on him to protect this defendant's interests, and followed his advice and instructions explicitly until his discovery of Benn's fraud upon this defendant as hereinafter more particularly set forth.

8. On April 6, 1959, Benn presented to this defendant a "stock purchase agreement", copy of which is annexed hereto as Exhibit "1", which he stated to this defendant he had prepared in order to give apparent authenticity to the arrangement aforementioned and which, at Benn's request, this defendant thereupon signed. Benn also signed the purported agreement "not individually or personally, but as set forth herein, i.e., for and on behalf of a corporation formed or to be formed." Benn had dated this agreement on March 14, 1959, which was the date of the first conference between Benn and this defendant, and insisted over this defendant's objection that it retain said date. Under said "agreement" this defendant agreed to sell to the dummy corpora-

tion "purchaser" his 66-2/3 shares of the capital stock of Garfield & Sankin, Inc. for the price of \$600,000 to be represented by two non-negotiable promissory notes of the purchasing corporation, one in the amount of \$60,000, payable on demand, and the second in the amount of \$540,000, payable on or before December 1, 1959; and this defendant further agreed that this defendant's stock in Garfield & Sankin, Inc. should be delivered by him in escrow to the defendant Riggs National Bank "until such time as the total amount of \$600,000 has been paid in full in cash to the escrow agent" for this defendant's account. It was further provided in said "agreement" that the said sale was made "subject to Julius Sankin's option to purchase said 66-2/3 shares of stock upon the same terms and conditions as the purchaser (i.e. the dummy corporation) named herein."

9. Promptly after the execution of the "agreement" referred to as Exhibit 1, this defendant and Benn came to Washington and, at Benn's request, conferred with defendant Saunders, who was and is Benn's personal attorney in certain matters. Benn arranged for the preparation, in Saunders' office, of an "escrow agreement" with The Riggs National Bank to be executed by this defendant and the new "dummy corporation", which by this time he had decided would be called "5410 Connecticut Avenue Corporation" (defendant herein). A copy of said escrow agreement is annexed to the answer of the defendant The Riggs National Bank in this action, and reference thereto is hereby made. At Benn's request, said escrow agreement was duly executed by this defendant, by The Riggs National Bank, and by "5410 Connecticut Avenue Corporation" (which had not then been formed) "by James T. Benn, President, pro-tem." At the same time there were delivered to The Riggs National Bank the two notes for \$60,000 and \$540,000, above referred to, signed in the

name of "5410 Connecticut Avenue Corporation, by James T. Benn, President, pro-tem," and a stock power which this defendant signed also at Benn's request, assigning to "5410 Connecticut Avenue Corporation" the 66-2/3 shares of the stock in Garfield & Sankin, Inc. which this defendant owned. Two days later, when this defendant had returned to Miami, this defendant, acting under instructions from Benn, sent to The Riggs National Bank his actual stock certificate evidencing his ownership of said 66-2/3 shares, which stock certificate is still in the hands of said Riggs National Bank and which is still registered in the name of this defendant.

10. On April 10, 1959, the defendant Saunders, at the request of Benn, caused the Corporation Trust Company in the District of Columbia (a corporation servicing company for lawyers) to form a District of Columbia corporation by the name of "5410 Connecticut Avenue Corporation", which is the "dummy corporation" hereinabove referred to, is the first named defendant in this action, and which is hereinafter called "5410". Said corporation was formed with an authorized capital stock of only 100 shares without par value, at the insistence of this defendant, who had been told that he was to be the sole beneficial stockholder of said corporation, and over the objection of Benn, who had suggested an authorized capital stock of 1000 shares. The incorporators of "5410" were employees in the Washington office of the Corporation Trust Company, and in the certificate of incorporation there were named as the first directors of "5410", to serve until the first meeting of shareholders, Glenn L. Archer, Jr., Betty Anne Murphy and William Nelson Schnell, all of whom were associates or employees of the law firm of which Saunders was a member. Benn caused said directors to name him as president of "5410" and to name Saunders as secretary of said "dummy corporation".

11. On or about April 19, 1959, Benn learned for the first time that there were substantial sums of money in the bank account of Julius Sankin, Inc., and thereupon advised this defendant that it was important to have what purported to be a "transaction" between this defendant and the dummy "5410" covering this defendant's stock in Julius Sankin, Inc., of the same character as that heretofore entered into respecting this defendant's interest in Garfield & Sankin, Inc. Accordingly, this defendant met Benn in Saunder's office and arranged for the preparation of a purchase agreement, copy of which is annexed hereto as Exhibit "2", and for the execution and delivery to The Riggs National Bank of an additional escrow agreement, copy of which is also annexed to the answer of The Riggs National Bank herein. Under the purchase agreement respecting the stock of this defendant in Julius Sankin, Inc., the note of "5410" was for \$200,000, making an aggregate of \$800,000 principal amount of notes of "5410" payable to this defendant for his stock interest in Garfield & Sankin, Inc. and Julius Sankin, Inc. The purchase agreement respecting this defendant's stock in Julius Sankin, Inc. was also declared to be subject to plaintiff's option to purchase the same under the agreement annexed to plaintiff's complaint as Exhibit "B". As in the previous transaction, the purchase money note was signed "5410 Connecticut Avenue Corporation, by James T. Benn, President, pro-tem." At the request of Benn this defendant also executed and gave to the Riggs National Bank a stock power for this defendant's 66-2/3 shares of stock in Julius Sankin, Inc. for which he later substituted the stock certificate itself. Said stock certificate is still in the hands of the Riggs National Bank and is still registered in the name of this defendant.

12. On April 21, 1959, this defendant executed and sent

to the plaintiff the notices of the aforesaid transactions with "5410", copies of which are annexed to plaintiff's complaint as Exhibits "C" and "D", respectively. Said notices were executed by this defendant on Benn's instructions.

13. On or about April 21, 1959, this defendant, acting again under Benn's instructions, subscribed and paid for all of the authorized capital stock of "5410", to-wit, 100 shares, at and for the price of \$1,000, and this defendant gave to Benn his check for said amount, payable to cash. It was understood between this defendant and Benn that said stock was to be issued in the name of Benn, but that this defendant would be the beneficial owner thereof, and that Benn would endorse said stock certificate, when issued, in blank and deliver it to this defendant. Thereupon Benn and Saunders opened an account in the name of "5410" in The Riggs National Bank, subject to the right of either one of them to draw funds thereon, and deposited in said account the \$1,000 paid by this defendant for the purchase of said stock, as aforesaid. This defendant believes that Saunders was at that time unaware of this defendant's beneficial interest in "5410".

14. On or about April 24, 1959, this defendant at Benn's insistence, and in order to give color to the aforesaid transactions, resigned as officer and director of Garfield & Sankin, Inc. and Julius Sankin, Inc., and at this defendant's request (made on Benn's instructions) Benn was elected by the remaining directors as successor director to this defendant in each of said corporations and as an officer thereof.

15. Following the purchase by this defendant of all of the capital stock of "5410", as aforesaid, this defendant made repeated requests upon Benn that he deliver to this defendant a formally-issued stock certificate in "5410" registered in the

name of Benn and endorsed by him in blank, pursuant to their understanding. Benn continued to promise this defendant that such stock would be delivered forthwith, but failed to make such delivery.

16. On or about April 27, 1959, Benn, at the insistence of this defendant, executed and delivered to this defendant a "stock power", copy of which is annexed hereto as Exhibit "3", assigning unto this defendant "One Hundred (100) shares of the common-voting-no par capital stock of the 5410 Connecticut Ave. Corporation standing in James T. Benn's name on the books of said 5410 Connecticut Ave. Corporation represented by Certificate No. 1".

17. On May 4, 1959, at the insistence of Benn that it was necessary to give apparent substantial assets to "5410" and thus to protect this defendant in his relations with the plaintiff, this defendant executed and delivered an "irrevocable assignment" to Benn "acting for and on behalf of 5410 Connecticut Avenue Corporation" of all moneys due and to become due from Garfield & Sankin, Inc., Julius Sankin, Inc., and Julius Sankin, individually, "with full irrevocable right and authority of the said James T. Benn, acting for and on behalf of 5410 Connecticut Ave. Corporation, to ask, to make demand for, collect, sue for, accept payment of and give, receive, release and acquittance for said money." A copy of said "irrevocable assignment" is annexed hereto as Exhibit "4". This defendant executed said "irrevocable assignment" at the request of Benn without hesitation, relying upon the stock power and stock certificate in "5410" which had previously been delivered by Benn to this defendant, and which in the then opinion of this defendant evidenced this defendant's sole ownership of said "5410".

18. On or about May 4, 1959, Benn told this defendant that because of the fact that the \$800,000 in notes which "5410"

had given to The Riggs National Bank were notes of a "dummy" corporation without assets (other than the \$1,000 paid by this defendant for stock as aforesaid) the transaction might still be subject to attack by plaintiff, and that the way to avoid such attack would be to apparently substitute for said notes 2,000 shares of "bearer voting stock" in International Timber Corporation, a Panamanian Corporation, which he, Benn, purported to own. Benn thereupon induced this defendant to join in a letter which he, Benn, signed as President of "5410" addressed to The Riggs National Bank, and directing them to cancel the \$800,000 in promissory notes of "5410" then in the hands of The Riggs National Bank, falsely alleging that the same had been paid by delivery to this defendant of 2,000 shares of "no par bearer voting capital stock of the International Timber Corporation." Benn represented to this defendant that such action would effectually prevent the plaintiff from exercising any option to acquire this defendant's stock in Garfield & Sankin, Inc. and Julius Sankin, Inc. and would effectuate a destruction of the voting restrictions embodied in the agreements referred to as plaintiff's Exhibits "A" and "B". Acting in accordance with the instructions from this defendant and Benn, The Riggs National Bank did mark the aforesaid notes of "5410" in the aggregate principal sum of \$800,000 "cancelled" and delivered them to the defendant Saunders. The defendant Benn has never delivered said stock in the International Timber Corporation either to this defendant or to The Riggs National Bank (although this defendant may have receipted for the same at Benn's request) and this defendant is now informed and believes and therefore avers that said International Timber Corporation has no assets of any value and that the stock therein held by Benn, if any, is and at all times has been worthless.

19. In all of the foregoing actions, this defendant believed and relied upon the representations made to him by Benn and the assurances given him by Benn that he was acting solely in the interests of this defendant, that he, Benn, would receive nothing out of the transactions for himself, but was endeavoring to "make up" to this defendant for losses sustained by this defendant in his prior business transactions with Benn. This defendant, however, has since learned and therefore now avers that the aforesaid actions of Benn and other actions hereinafter referred to, were all done by Benn and by others in concert with him and by "5410" through Benn, pursuant to a fraudulent scheme on the part of Benn to divest this defendant of all of his legitimate interests as stockholder and creditor of Garfield & Sankin, Inc. and Julius Sankin, Inc., and to obtain said interests for his (Benn's) own use and benefit, and for the use and benefit of those in concert with him who now claim to be officers and/or directors of "5410".

20. In furtherance of his aforesaid fraudulent scheme to defraud this defendant, the said Benn and "5410" acting through Benn as its president, have performed or caused to be performed certain additional acts, set forth in paragraphs 21 and 22 hereof, which acts were wholly unknown to this defendant at the time and none of which became known to this defendant until after May 4, 1959.

21. On April 22, 1959, and wholly unknown to this defendant, the defendant Saunders, acting, as this defendant is informed and believes, under instructions from Benn and as secretary and attorney for "5410", requested the Corporation Trust Company's nominees who were "incorporators" of "5410" to cause the Articles of Incorporation of "5410" to be amended, pursuant to Title 29,

Section 921g of the District of Columbia Code so as to increase the authorized capital stock of said corporation from 100 shares to 250 shares; and on said date Saunders wrongfully and erroneously certified to said Corporation Trust Company that no stock of "5410" had been subscribed to or purchased--such certification being made notwithstanding the purchase in Benn's name by this defendant on April 21, 1959, of the entire capital stock of "5410" and the opening of a bank account in the name of said corporation with the proceeds of said stock purchase. Acting under instructions from the defendant Saunders, the Corporation Trust Company, through its incorporators, thereupon erroneously caused a purported amendment of the Certificate of Incorporation of "5410" to be filed in the office of the Superintendent of Corporations of the District of Columbia, signed by said incorporators, erroneously certifying that no capital stock of "5410" had then been subscribed for, and purporting to increase its authorized capital stock from 100 shares to 250 shares. This defendant did not learn of said action until after the institution of this suit. This defendant is without knowledge as to what stock, if any, the officers of "5410" have purported to issue pursuant to said amendment, and is advised by counsel and therefore avers that any stock purported to have been issued by such officers is void and of no effect.

22. On or about April 24, 1959, Benn, having just become an officer and director of Garfield & Sankin, Inc. and Julius Sankin, Inc. (as a result of his false inducements and representations to this defendant, as aforesaid), caused Julius Sankin, Inc. to disburse to "5410" the sum of \$24,000, which Benn then caused to be deposited in the bank account of "5410" in The Riggs National Bank, which bank account was subject to withdrawal on checks signed either by Benn, as president of said corporation,

or by Saunders, as secretary thereof. This defendant is now informed and believes and therefore avers that Benn thereafter withdrew from said account for his own use and benefit all or substantially all of said funds. This defendant first learned of the withdrawal of said \$24,000 from Garfield & Sankin, Inc. by Benn on behalf of "5410" on May 5, 1959, but did not learn that the same had been disbursed for the use and benefit of Benn until after the institution of this suit.

23. After this defendant's discovery, on May 5, 1959, that Benn had caused "5410" to withdraw \$24,000 from the bank account of Julius Sankin, Inc. this defendant demanded from Benn an explanation. Benn thereupon repeated to this defendant his assurance that this defendant was the sole owner of "5410" and that everything that he, Benn, had done was for the sole benefit of this defendant, and to re-assure this defendant on that point, Benn on or about May 9, 1959, delivered to this defendant a stock certificate "No. 1" in "5410" for 100 shares, annexed hereto as Exhibit "5". Benn dated said stock certificate June 3, 1959, which date he said he inserted because it was after the expiration of Sankin's options, and would therefore be unquestionably "legal". The said stock certificate was signed by "5410" through Benn as its president, was registered in Benn's name, and was endorsed by him in blank.

24. On May 11, 1959, this defendant for the first time consulted an attorney with respect to certain of the transactions referred to in this cross-claim. This defendant was advised by said attorney to take all steps necessary to regain in all respects his original position in relation to Garfield & Sankin, Inc., Julius Sankin, Inc. and Julius Sankin individually, and to this end to obtain from Benn a currently effective stock certificate

in "5410" which could be registered in this defendant's name on the books of "5410", all pursuant to the stock power theretofore given by Benn to this defendant as referred to in paragraph 16, supra. This defendant was further advised by his counsel that upon receipt of such stock certificate from Benn he should present the same to "5410" for record transfer to this defendant. At the request of this defendant the defendant Benn delivered to this defendant in Miami, Florida, on May 12, 1959, another stock certificate for 100 shares of the capital stock of "5410", executed by that corporation through Benn as its president, registered in Benn's name, and endorsed by him in blank. A copy of said stock certificate is annexed hereto as Exhibit "6".

25. On May 14, 1959, Arthur J. Phelan, Esquire, then acting as attorney for this defendant, presented to the defendant Saunders, as secretary of "5410" the stock certificate for 100 shares of the capital stock of "5410", referred to as Exhibit "6", together with the stock power annexed hereto as Exhibit "3", and requested that a certificate for 100 shares of the capital stock of "5410" be forthwith issued and registered in the name of this defendant. The defendant Saunders wrongfully refused to accede to this request.

26. On advice of counsel, this defendant on or about May 15, 1959, proffered and requested of Benn a complete rescission of all of the transactions hereinabove referred to. Said request and proffer of rescission, and the improper conduct of Benn were discussed by this defendant's counsel on May 22 and May 25 with the defendant Saunders and with one Dinty W. Whiting, a Miami attorney, who was then representing Benn, and who now claims to be a "bona fide" subsequent purchaser of stock in "5410" and vice-president thereof, and who has appeared in hearings before this

court as alleged attorney for and vice-president of "5410". The proposed rescission was also discussed on May 22 and May 25, 1959, with the defendant Saunders who was then representing both Benn and "5410". Benn failed and refused to rescind the transactions as proffered, or in any other respect. This defendant is still prepared to rescind all of said transactions and tenders himself to the court as ready so to do upon such terms and conditions as the court may deem equitable and proper.

27. On May 28, 1959, this defendant made a full disclosure to the plaintiff Sankin and counsel for said plaintiff of the acts hereinabove set forth and offered to make amends to said plaintiff in any appropriate way; and agreed to indemnify the plaintiff from any loss or expenses which plaintiff Sankin might suffer or incur as a result of any claim asserted against him arising out of the aforementioned transactions, including attorneys' fees in any court proceedings which plaintiff deemed it necessary to institute for his protection.

28. This defendant is informed and believes and therefore avers that Dinty W. Whiting who now claims to be vice-president and director and stockholder of "5410" and Joseph Pardo who now claims to be secretary and director and stockholder of "5410" have been and are acting in concert with Benn in certain of the transactions hereinbefore referred to, and had actual or constructive notice of the fraudulent action of Benn above set forth; that Benn, who since the incorporation of "5410" had controlled the actions of said corporation and of its board of directors (nominated from Saunders' office force as aforesaid), did on or about May 28, 1959, purport to resign as president of "5410", and did cause said directors to resign and select in their stead said Whiting, Pardo and others in concert with Benn as officers and

directors of "5410"; and said persons so chosen have wrongfully caused "5410" to file pleadings in this court denying the ownership of stock in said corporation by this defendant and have otherwise wrongfully attempted to preserve for the defendant Benn and for themselves the fruits of Benn's aforesaid fraudulent acts.

29. This defendant is advised by counsel and therefore avers that although the actions of this defendant hereinabove referred to may be considered as the actions of a transferor under fraudulent conveyances, nevertheless under the circumstances hereinabove mentioned and to the extent that said fraudulent conveyances have not been consummated, this court may decline to give its aid in such consummation, and may also decline to permit "5410", the transferee under said fraudulent conveyances, to take any further action looking toward the enforcement of agreements or transactions not heretofore completely consummated or enforced. This defendant therefore represents and shows to this court as follows:

(a) The stock certificates representing the 66-2/3% interest of this defendant in Garfield & Sankin, Inc. and in Julius Sankin, Inc., now held in escrow at The Riggs National Bank, and for which said Riggs National Bank has filed interpleader in this court, are still registered in the name of this defendant, and despite desperate efforts on the part of Benn and other purported officers of "5410" to obtain a transfer of said stock on the books of Garfield & Sankin, Inc. and Julius Sankin, Inc. to the name of "5410", said transfers have not yet been made. Without the aid of this court or of the parties to this action, said transfers of stock cannot be made and if said transfers are not hereafter made this defendant's rights to his stock interest in Garfield & Sankin, Inc. and Julius Sankin, Inc. will remain

unimpaired, subject only to the purchase contract of Julius Sankin, set forth in his complaint filed herein.

(b) The assignment by this defendant to "5410" of all his right, title and interest to moneys and assets in Garfield & Sankin, Inc. and Julius Sankin, Inc. annexed hereto as Exhibit "5", has not as yet resulted in the payment of any moneys or other assets to "5410", other than the \$24,000 referred to in paragraph 22, supra. This defendant is advised by counsel that this court has the power to decline to permit said assignment to become affirmatively effective or to be enforced in any way.

(c) The purported amendment to the Certificate of Incorporation of "5410", referred to in paragraph 21 hereof, being void and of no effect, and this defendant having paid for the 100 shares of stock originally authorized by said corporation and represented by the stock power and abortive stock certificates delivered to this defendant by Benn, this defendant is advised by counsel and therefore avers that he is now the sole equitable owner of all of the stock in "5410", and that this court is empowered to enjoin the present purported officers, directors and stockholders of "5410" from taking action which would result in divesting this defendant of his said equitable interest in said corporation, and from otherwise confirming Benn's aforesaid fraudulent acts.

WHEREFORE, THE PREMISES CONSIDERED, this defendant prays:

1. In the alternative as follows:

(a) that this court may direct a complete rescission of all of the transactions and uncompleted transfers referred to in this cross-claim upon such terms as to the court may seem meet and proper.

(b) that the court may declare all uncompleted transfers and all agreements and contracts referred to in this cross-claim to be null and void to the extent that they have not already been fully consummated.

(c) that this defendant may be declared to be the sole legal and equitable stockholder of "5410" and that the defendants to this cross-claim may be required to execute all necessary documents to vest this defendant with full ownership of all the stock of said corporation.

2. That the defendants Benn and "5410" may be required to account to this defendant for moneys which they or either of them have diverted from Garfield & Sankin, Inc. and from Julius Sankin, Inc.

3. That the purported amendment to the certificate of incorporation of "5410" filed on May 4, 1959, may be declared null and void.

4. That this court may appoint an independent receiver for "5410" who may control the further proceedings in this court on its behalf and that the present purported officers, directors and attorneys for said corporation may be enjoined from action on its behalf adverse to the interests of this defendant.

5. That "5410" may be enjoined from enforcing or seeking to enforce against this defendant any of the agreements and assignments or other documents executed by this defendant and purporting to affect this defendant's stock interests or other interests in Garfield & Sankin, Inc. and Julius Sankin, Inc.

6. That this defendant may have such other, further and alternative relief as the nature of the case may require and to the court seem meet and proper, this defendant declaring himself

to the court as being at all times ready and willing to do equity in the premises.

/s/ Joseph A. Garfield
Joseph A. Garfield
6510 Grenada Boulevard
Coral Gables, Florida.

DOUGLAS, OBEAR & CAMPBELL

/s/ Edmund D. Campbell
Edmund D. Campbell

/s/ Benj. W. Dulany
Benj. W. Dulany
Attorneys for Defendant
Joseph A. Garfield
822 Southern Building,
Washington 5, D. C.

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, JOSEPH A. GARFIELD, do solemnly swear that I have read the foregoing and annexed answer and cross-claim by me subscribed and know the contents thereof; that the matters and things therein stated are true, except those stated on information and belief and as to those I verily believe them to be true.

/s/ Joseph A. Garfield

SUBSCRIBED and SWORN TO before me this 22 day of June,
1959.

/s/ Howard F. Weber
Notary Public

Notary Public, State of Florida
at large
My commission expires Mar. 23, 1962

***** STOCKHOLDERS AGREEMENT *****

This agreement entered into this 1st day of May, 1958 by and between the undersigned, stockholders of Garfield and Sankin, Inc., a corporation created and existing under the laws of the District of Columbia.

1. Notwithstanding the amount and percentage of the whole of the common stock of Garfield and Sankin, Inc., owned by each of the undersigned, they and each of them, severally and individually, for themselves, their heirs, and assigns, agree that each shall have an equal vote in the affairs of the corporation. The effect of this agreement is that neither one of the undersigned, heirs, or assigns, can have a larger or greater vote than the other irrespective of the numerical amount of the stock owned by each of the undersigned.

2. In case of any disagreement the matter is to be resolved by arbitration, each side of the controversy appointing one member and the two so appointed, in case of disagreement, to select a third.

3. It is further agreed by the undersigned that each stockholder and his heirs and assigns will not dispose of any of the shares without first offering same upon 30 days written notice to the other stockholder or stockholders.

4. Nothing herein contained shall affect the proportion of profit or loss which is based on the percentage of stock owned by each of the undersigned.

Witness:

/s/ A. M. Chaite

/s/ A. M. Chaite

/s/ J. A. Garfield

/s/ Julius Sankin

*Plaintiff's Ex 2
(Ex 3, similar
but related to
Sankin, Inc.)*

STOCK PURCHASE AGREEMENT

Pre's. Exhibit 22

THIS AGREEMENT entered into this 14 day of March, 1959,
by and between JOSEPH A. GARFIELD, hereinafter referred to as
"Seller," and JAMES T. BENN, not individually or personally, but
acting for and on behalf of a corporation formed or to be formed,
hereinafter referred to as "Purchaser,"

W I T N E S S E T H:

WHEREAS, SELLER represents that he is the owner and holder
of 66-2/3 shares of the authorized issued and outstanding shares
of common-voting capital stock of GARFIELD & SANKIN, INC., a cor-
poration organized and existing under the District of Columbia
Business Corporate Act, Washington, D. C., and

WHEREAS, said shares of common voting capital corporate
stock represent 66-2/3 per cent of the authorized, issued and out-
standing capital shares of the common-voting stock of GARFIELD &
SANKIN, INC., and

WHEREAS, SELLER desires to sell, and PURCHASER desires to
purchase said 66-2/3 per cent representing 66-2/3 shares of the
capital corporate, common-voting stock for the purchase price of
and upon the terms and conditions as hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and
covenants and agreements hereinafter set forth, the parties hereto
do covenant and agree as follows:

1. SELLER agrees to sell to the PURCHASER, and the
PURCHASER agrees to purchase from the SELLER, the said 66-2/3 per
cent or 66-2/3 shares of the authorized, issued and outstanding
corporate capital common-voting shares of the corporate stock of
GARFIELD & SANKIN, INC., for the price and upon the terms and
conditions as set forth in the following paragraphs of this agreement.

2. PURCHASER agrees to pay to the SELLER the agreed purchase price of Six Hundred Thousand Dollars (\$600,000.) and the payment of the said purchase price shall be in the following form and manner.

(a) One (1) demand promissory note, non-negotiable, in the face amount of Sixty Thousand Dollars (\$60,000.), made and executed by the corporation to be formed to take title to the stock being purchased.

(b) One (1) promissory note, non-negotiable, in the face amount of Five Hundred Forty Thousand Dollars (\$540,000.), due and payable on or before December 1, 1959, made and executed by the corporation to be formed to take title to the stock being purchased.

3. SELLER agrees to transfer and assign to PURCHASER said 66-2/3 shares of common-voting stock representing 66-2/3 per cent of all of the authorized, issued and outstanding common-voting shares of capital corporate stock of said GARFIELD & SANKIN, INC., and to deliver said 66-2/3 shares of the common-voting stock of said corporation to Riggs National Bank, Main Office, Washington, D. C., or any other agreed to (mutually) banking institution; said banking institution shall be in the capacity of a fiduciary agent, which said fiduciary agent shall hold the said 66-2/3 shares of common-voting stock in escrow until such time as the total amount of Six Hundred Thousand Dollars (\$600,000.) has been paid in full in cash to the escrow agent for the account of the SELLER.

The 66-2/3 shares of common-voting stock referred to herein and being sold hereunder shall be deposited in the Riggs National Bank of Washington or shall be deposited at any other mutually agreed banking institution. SELLER shall deliver

said 66-2/3 shares of common-voting stock to the escrow agent and said shares of stock shall be held in escrow pursuant to the terms and conditions of this agreement. The above notes referred to herein representing the purchase price shall be payable at the same banking institution that shall hold the said stock in escrow. The banking institution (escrow and fiduciary agent) shall be authorized to deliver said 66-2/3 shares of common-voting stock being purchased hereunder to the PURCHASER upon receipt by the escrow agent of the purchase price in full in cash. In the event of any default in the payment of said notes or in the event any of the terms and conditions contained in this agreement shall be breached by the PURCHASER, then in that event the bank shall be authorized to deliver forthwith upon notice from the SELLER of such default or breach, the said 66-2/3 shares of common-voting stock to the SELLER.

4. SELLER represents to the PURCHASER that the said GARFIELD & SANKIN, INC. assets are as follows:

(a) 165 apartment units located at 5410 Connecticut Avenue, N.W., Washington, D.C., said apartment building commonly known as The Garfield, and that the said apartment units are all furnished with ranges, refrigerators, dish-washers and garbage-disposal units, and further that all public places such as the lobby, halls, etc., are completely decorated and furnished, and that the said 165 apartment units shall all be ready for occupancy not later than June 1, 1959, and that the said apartment building is also known as FHA Project No. 000-00099, 5410 Connecticut Ave., North West, Washington, D.C., and that the said plans and specifications used in the construction of said 165-unit apartment building, eight stories, were prepared by Thomen & Cromar, registered architects, Washington, D.C., and that the legal de-

scription of the land upon which the eight-story, 165-unit apartment building referred to herein is situated, is as follows:

Lots 24, 25, 26, 824, 825, 826, 827 and 828, Square 1857, Washington, more particularly as per plat of survey attached hereto and prepared by Maddox and Hopkins, engineers and surveyors, in Silver Spring, Maryland.

(b) In addition to the above 165-units as referred to herein, the SELLER represents that an additional asset in the form of Sixty Thousand Dollars (\$60,000.) in cash is presently in a bank account or shall be delivered to an agreed bank account in favor of GARFIELD & SANKIN, INC., and the said \$60,000. referred to herein is an asset of the said corporation and shall be and remain an asset of said corporation, and shall not be withdrawn, directly or indirectly, from said corporation by the SELLER or PURCHASER or by anyone acting in their behalf, and shall be on deposit through the day of the closing of this transaction.

It is understood and agreed by all of the parties hereto that said \$60,000. bank deposit is to come from the proceeds of the permanent FHA mortgage financing, and in the event said permanent mortgage has not been closed or in the event there are not sufficient proceeds after payment of all other obligations of the corporation to make the said \$60,000. deposit, the SELLER shall contribute to the corporation as a capital contribution, any deficiency between the proceeds available for said deposit and \$60,000., and provided further that in the event this transaction shall be closed prior to the closing of the permanent mortgage, the SELLER shall lend the corporation \$60,000. for operating capital to be repaid to the SELLER from the proceeds

of said permanent mortgage loan insofar as the same will suffice after payment of all other corporate encumbrances, obligations, liabilities and claims, and will release the corporation from any deficit if the proceeds available are not sufficient to pay said loan.

5. SELLER represents that the said GARFIELD & SANKIN, INC. is free and clear of any and all liens, encumbrances, liabilities or claims regardless of the kind or nature. However, with the exception of a permanent first mortgage in the principal amount of \$2,269,900. to replace the present construction loan mortgage now of record, which said permanent first mortgage when the building is completed shall become the only encumbrance of record and the said first mortgage shall be placed of record, and the terms of said permanent first mortgage shall be repayable at the rate of \$3,783.17 per month plus interest thereon at the rate of 4-1/2 per cent per annum plus 1/2 per cent per annum for FHA insurance. The monthly payments shall be payable on the 1st day of August, 1959, and on the first day of each and every month thereafter until fully paid on October 1, 1998, at which time and date said mortgage expires.

6. SELLER agrees to remain with Garfield & Sankin, Inc., until such time as the construction of said 165-unit apartment building is finished and a complete certificate of occupancy therefor has been issued and received through the proper authorities, and further, the SELLER agrees to remain with Garfield & Sankin, Inc., and be responsible not only for the completion of the building as set forth in the plans and specifications, but also shall remain with said corporation and be responsible to the PURCHASER for the completion of the permanent mortgage which is in the process of being consummated and closed within the

Exhibit 1 (Cont)

next one hundred twenty days, and shall be responsible for the construction loan being paid off and released. All proceeds of the permanent mortgage above the amount of other liens, encumbrances, loans, liabilities and claims, shall remain in Garfield & Sankin, Inc.

7. The SELLER may, at his option, call the entire amount of moneys due to be made payable to him upon a thirty-day written notice in the event the management of said Garfield Apartment Building is determined by the SELLER to be unsatisfactory for any reason whatsoever.

8. The PURCHASER covenants and agrees to vote said stock so as to cause the said Garfield & Sankin, Inc. to be so managed and controlled that all income received from the rental of the said 165-unit apartment building and any and all revenue received or collected in connection with said apartment building and any and all moneys received or collected directly or indirectly by Garfield & Sankin, Inc., shall become trust funds upon the receipt thereof, and shall be forthwith deposited in a trust account at an agreed banking institution in the vicinity or general area of the operation of said Garfield Apartment Building, and the moneys so deposited shall be withdrawn or drawn against at such time only as to pay for operating expenses and other agreed fixed costs and expenses and expenditures but none of the expenses, fixed costs and expenditures shall exceed a competitive level based upon a comparison with not less than three (3) other apartment buildings of approximately similar size, location, construction and cost. No maintenance or repairs in the excess of One Hundred Dollars (\$100.00) shall be agreed to by Garfield & Sankin, Inc. except upon the receipt of three competitive bids (bona fide).

It is agreed and understood by all of the parties hereto that all bank checks and/or withdrawals for any reason whatsoever shall be signed by the new owner of said shares of stock sold hereunder or by his nominee designated in writing, and also by a member of an independent CPA firm who shall certify and insure to the SELLER all accounts payable and all accounts receivable, and the SELLER shall receive from said CPA firm (to be agreed upon by the PURCHASER and the SELLER) monthly reports as to all moneys received and collected and as to all moneys paid out by Garfield & Sankin, Inc.

In the alternative, Garfield & Sankin, Inc. may enter into a management contract with any person, firm, partnership or corporation approved by the SELLER provided said management contract shall vest exclusive control and management of the corporate assets in said person, firm, partnership or corporation, and shall provide among other things for the rendering of monthly operating statements to the corporation and the seller.

9. Heretofore the SELLER agreed to give and did give and grant to JULIUS SANKIN, 5400 Uppingham Street, Chevy Chase, Maryland, a thirty (30) day option to purchase the said 66-2/3 shares of common-voting stock of Garfield & Sankin, Inc., sold hereunder. Therefore, the PURCHASER agrees with the SELLER that the PURCHASER is purchasing said 66-2/3 shares of common-voting stock subject to JULIUS SANKIN's option to purchase said 66-2/3 shares of stock upon the same terms and conditions as the PURCHASER named herein.

10. It is agreed and understood by the parties hereto that JAMES T. BENN is acting for and on behalf of other parties in interest, and that a corporation shall take over by assignment

the rights under this contract entered into by JAMES T. BENN, on behalf of such corporation, and that upon the assignment by JAMES T. BENN to such corporation of his rights under this contract and notification by the corporation to the SELLER to the effect that the corporation shall be substituted in place and instead of JAMES T. BENN, then all liabilities of JAMES T. BENN shall be terminated and extinguished and the corporation shall simultaneously assume liability and performance thereunder, and this condition is a condition precedent to the whole transaction and shall survive the closing of this transaction, to which said condition the SELLER unconditionally agrees thereto. ,

11. This transaction shall be fully consummated not later than April 10, 1959, and all of the parties hereto do herein agree to make, execute and deliver any and all papers required and necessary to consummate this transaction on or before April 10, 1959.

12. This Agreement shall be binding and inure to the benefit of the heirs, administrators, executors, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, all the parties hereto have hereunto set their hands and seals to this Stock Purchase Agreement in quadruplicate, this 14 day of March, 1959, at Miami, Dade County, Florida.

Joseph A. Garfield
Joseph A. Garfield, Seller

James T. Benn
James T. Benn,
not individually or personally
but as set forth herein

Signed and delivered in
the presence of:

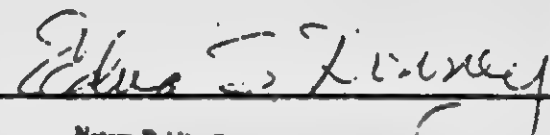
William J. Zinner
Janet Garfield

STATE OF FLORIDA)
COUNTY OF DADE)

Exhibit 1 (Cont)

I HEREBY CERTIFY that on this 14 day of March, 1959,
before me personally came JOSEPH A. GARFIELD and JAMES T. BENN,
to me known to be the individuals described in and who executed
the foregoing Stock Purchase Agreement dated March 14, 1959,
and have acknowledged before me that they executed the same
for the purposes therein expressed.

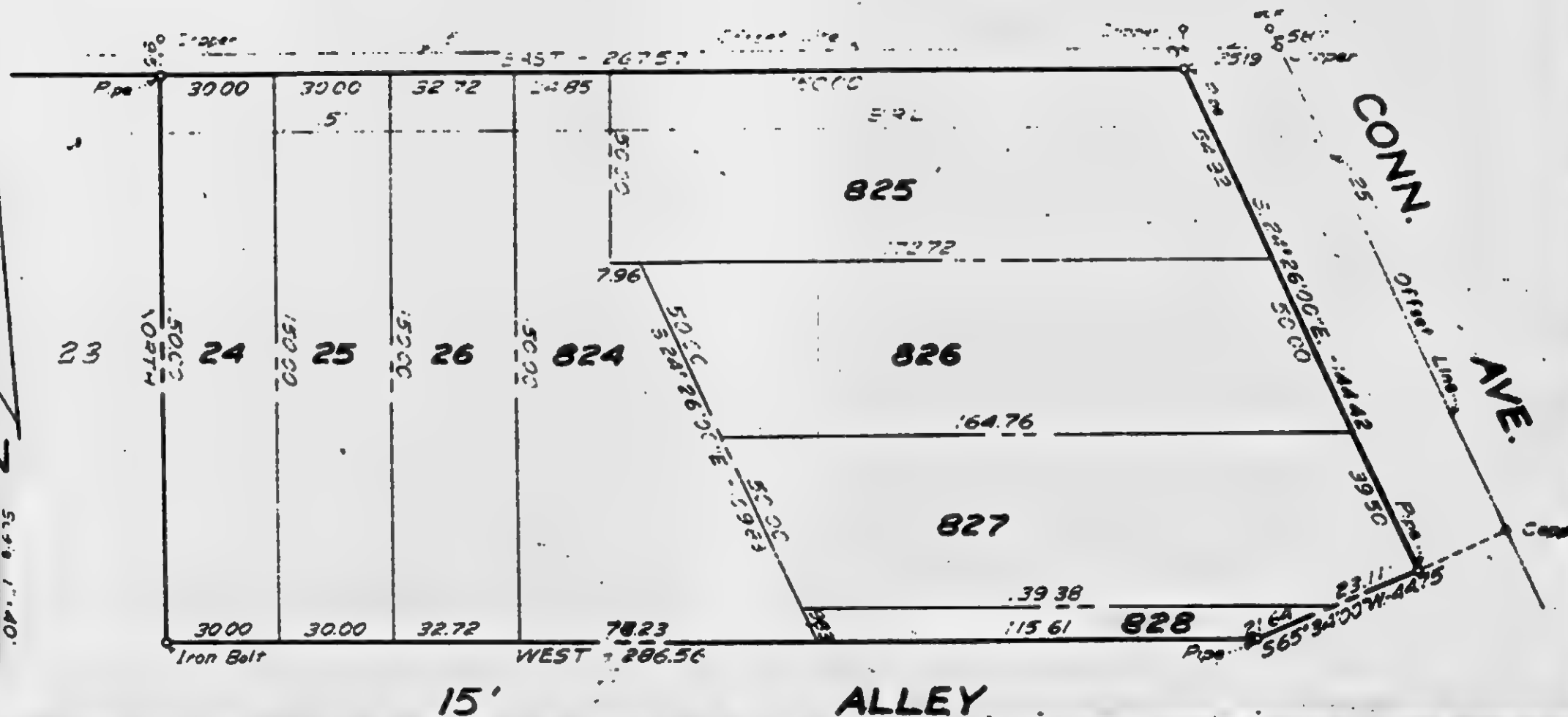
WITNESS MY SIGNATURE AND OFFICIAL SEAL at Miami, Dade
County, Florida, the day and year last before said.


Notary Public, State of Florida at Large.
My Commission Expires July 9 1962.
Bonded by American Surety Co. of N. Y.

PLAT OF SURVEY
 Lots 24, 25, 26, 824 thru 828 Square 1857
 Washington, D. C.
 Scale: 1" = 40' April 23, 1958

Maddox & Hopkins
 Engineers and Surveyors
 Silver Spring, Maryland

LEGATION STREET



ESCROW AGREEMENT

This Escrow Agreement, made this 8th day of April, A.D., 1959, by and between JOSEPH A. GARFIELD, hereinafter referred to as party of the first part, and 5410 CONNECTICUT AVENUE CORPORATION, hereinafter referred to as party of the second part, and THE RIGGS NATIONAL BANK, hereinafter referred to as Escrow Agent, WITNESSETH:

WHEREAS, party of the first part is the owner of sixty-six and two-thirds ($66\frac{2}{3}$) shares of the authorized, issued and outstanding capital corporate common voting stock of Garfield & Sankin, Inc., a District of Columbia corporation, said sixty-six and two-thirds ($66\frac{2}{3}$) shares representing sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of all of the authorized, issued and outstanding capital shares of the common voting stock of said Garfield & Sankin, Inc., and

WHEREAS, under certain Stock Purchase Agreement dated March 14, 1959, by and between said party of the first part and party of the second part, the party of the first part undertakes to sell to party of the second part said sixty-six and two-thirds ($66\frac{2}{3}$) shares of said stock and party of the second part undertakes to purchase said sixty-six and two-thirds ($66\frac{2}{3}$) shares of said stock, and

WHEREAS, party of the first part does hereby agree to deliver the said sixty-six and two-thirds ($66\frac{2}{3}$) shares of said stock to escrow agent and the said escrow agent agrees to hold said sixty-six and two-thirds ($66\frac{2}{3}$) shares of stock, as escrow agent, until the following terms and conditions are fulfilled.

NOW, THEREFORE, IN CONSIDERATION OF the sum of One Dollar (\$1.00) lawful money of the United States, receipt whereof is hereby acknowledged, and of the mutual covenants hereinafter contained, it is agreed as follows:

1. First and second parties do hereby appoint and designate The Riggs National Bank as escrow agent for the purposes as hereinafter set forth.

2. Party of the first part will cause to be deposited before the close of banking hours on Friday, April 10, 1959, the following described property:

Sixty-six and two-thirds (66-2/3) shares of the common voting stock, representing sixty-six and two-thirds (66-2/3) per cent of the authorized, issued and outstanding capital shares of the common voting stock of Garfield & Sankin, Inc., a District of Columbia corporation.

3. Party of the second part does hereby deposit with the said escrow agent the following described property:

One (1) demand promissory note, non negotiable, in the face amount of Sixty Thousand Dollars (\$60,000.00) made and executed by the said party of the second part, and one (1) promissory note, non negotiable, in the face amount of Five Hundred Forty Thousand Dollars (\$540,000.00) due and payable on or before December 1, 1959, made and executed by the said party of the second part.

4. First and second parties do hereby authorize the said escrow agent to keep and preserve the said properties in its possession until the payment in full of the said promissory notes hereinbefore referred to; ^{is made to escrow agent for account of party of first part} or if the party of the second part defaults in the payment of any of its undertakings under the terms of the above-described notes, and in the event the said notes are not paid in accordance with their terms, to thereupon deliver the said sixty-six and two-thirds (66-2/3) shares of stock hereinbefore described to the party of the first part; and it is expressly understood that in the event the party of the second part fails, neglects or refuses to pay the said notes when due, then the escrow agent is hereby authorized to deliver the aforesaid shares of stock to the party of the first part, and return to party of the second part the said notes and any cash payments held by the escrow agent for the account of party of first part.

John E. Smith
John E. Smith

5. First and second parties do hereby authorize the said escrow agent to turn over to the respective parties the properties hereinabove described which have been deposited by each of said parties upon a written consent executed by both the parties of the first and second parts.

6. In connection with responsibilities hereunder, it is understood and agreed that the escrow agent will not be required to enforce any agreement as between the party of the first part and the party of the second part, or others, and that if any disputes shall arise with respect to the properties herein deposited, it is understood and agreed that the escrow agent may interplead either of the said parties of the first and second parts and that the said parties of the first and second parts will indemnify The Riggs National Bank against all consequences and expenses to which it may be put. It is further understood that in the event that the escrow agent shall act upon advice purporting to be genuine and true, and shall do so in good faith, said escrow agent assumes no responsibility or obligation of any kind whatsoever, and that in such contingencies the escrow agent will be held harmless and free from all responsibility. In the event that the escrow agent shall find it necessary to consult with counsel of its own choosing in connection with this escrow agreement, any expenses so or otherwise incurred shall be for the account of the parties of the first and second parts, both of which agree to reimburse the escrow agent upon request.

IN WITNESS WHEREOF, the parties hereto have set their hands on this 8th day of April, 1959.

Personally appeared Joseph A. Garfield and
James T. Benn known to me, acknowledging
that their act and deed this 8th day of
April, 1959.

[Signature]
Notary Public, D. C.
My commission expires July 14, 1962

ATTEST:

[Signature]
Trust Officer

[Signature]
Joseph A. Garfield
5415 CONNECTICUT AVENUE CORPORATION

By *[Signature]* President Pro-Tem
James T. Benn

THE RIGGS NATIONAL BANK

By *[Signature]*
Vice President and Trust Officer

For Value Received,

hereby sell, assign and transfer unto...

James J. Benn
Joseph A. Garfield

One Hundred

(100)

Shares of the

Common-Voting-Stock

Capital Stock of the

5410 Connecticut Ave Corporation

standing in

James J. Benn

name on the books of said

5410 Connecticut

Ave Corporation

represented by Certificate No. 1

herewith

and do hereby irrevocably constitute and appoint

Joseph A. Garfield

as

attorney to transfer the said stock on the books of the within named

Corporation

with full power of substitution in the premises.

James J. Benn

Dated

In presence of

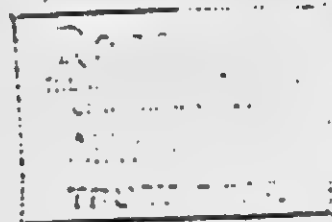
Joseph A. Garfield

Edna S. Downey

Notary Public, State of Florida at Large.
My Commission Expires July 9 1962.
Bonded by American Surety Co. of N. Y.

Proven

5410 CONNECTICUT AVE. CORPORATION
1000 Shoreham Building
Washington, D. C.



Miami, Florida,
May 4, 1959

The Riggs National Bank
Trust Department
1508 "K" St., N.W.
Washington, D. C.

Attention: Mr. Shaw and Mr. Wiegering

Gentlemen:

Enclosed herewith please find Joint Letter of Authorization made
and executed by Joseph A. Garfield and 5410 Connecticut Ave.
Corporation.

As you will note, the Joint Letter of Authorization is self-
explanatory.

Thank you for your usual careful attention.

Very truly yours,

5410 CONNECTICUT AVE. CORPORATION

By: James B. ...
President

JTB:esd
Enc.

PTF Ex 33

JOINT LETTER OF AUTHORIZATION

Miami, Florida,
May 4, 1959

The Riggs National Bank
Trust Department
1508 "H" St., N.W.
Washington, D.C.

Attention: Mr. Shaw and Mr. Wiegering

Gentlemen:

You are presently holding in escrow, pursuant to Escrow Agreements dated April 8, 1959 and April 21, 1959, certain stock certificates issued by Garfield and Sankin, Inc., and Julius Sankin, Inc., and registered in the name of Joseph A. Garfield, and attached to said stock certificates are executed stock powers signed by Joseph A. Garfield in favor of 5410 Connecticut Ave. Corporation, purchasers of same.

Further, you are presently holding in escrow pursuant to said above Escrow Agreements the following promissory notes:

One (1) demand promissory note, non-negotiable, in the face amount of Sixty Thousand Dollars (\$60,000.00), dated April 8, 1959,
AND One (1) promissory note, non-negotiable, in the face amount of Five Hundred Forty Thousand Dollars (\$540,000.00), dated April 8, 1959, due and payable on or before December 1, 1959. Payee of said above two (2) notes is Joseph A. Garfield, and payor of said above two (2) notes is 5410 Connecticut Ave. Corporation, and

One (1) demand promissory note, non-negotiable, in the face amount of Two Hundred Thousand Dollars (\$200,000.00), dated April 21, 1959. Payee is Joseph A. Garfield, and payor is 5410 Connecticut Ave. Corporation.

You are hereby irrevocably authorized and directed by the undersigned to deliver or cause to be delivered the said above three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00) to 5410 Connecticut Ave. Corporation, attention of Benjamin H. Saunders, Secretary, #1000 Shorham Building, Washington, D. C. All of the above three (3) promissory notes shall be MARKED "CANCELLED," AND DATED.

For your record, please be advised that Joseph A. Garfield, payee of said above three (3) promissory notes, has this day received, from James T. Benn acting for and on behalf of 5410 Connecticut Ave. Corporation, payor of said above three (3) promissory notes, two thousand (2,000) shares of no par value bearer stock of INTERNATIONAL TIMBER CORPORATION, in exchange for Joseph A. Garfield's right, title and interest in and to the said three (3) promissory notes, for which the payee named herein has this day acknowledged receipt of said shares of stock as full, total and complete payment of the above three (3) promissory notes in the aggregate sum of Eight Hundred Thousand Dollars (\$800,000.00).

In connection with the responsibilities hereunder, it is expressly understood and agreed by the undersigned that paragraph 6 of the Escrow Agreements dated April 8, 1959 and April 21, 1959, be made a part and parcel of this Joint Letter of Authorization as though said paragraph 6 were fully set forth herein.

Very truly yours,

Joseph A. Garfield
JOSEPH A. GARFIELD

5410 CONNECTICUT AVE. CORPORATION

By: James T. Benn
James T. Benn, President

Signed, sealed and
delivered in the
presence of:

Robert T. Garfield
Elva S. Downey

STATE OF FLORIDA)
COUNTY OF DADE) SS:

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, JOSEPH A. GARFIELD individually and JAMES T. BENN as President of 5410 Connecticut Ave. Corporation, to me well known to be the persons described in and who executed the foregoing Joint letter of Authorization, and acknowledged before me that they executed the same freely and voluntarily for the purpose therein expressed.
WITNESS my hand and official seal at Miami, Dade County, Florida,
this 4th day of May, 1959.

Elva S. Downey
Notary Public, State of Florida at Large
My Commission Expires July 9, 1960

IRREVOCABLE ASSIGNMENT

LA 11004 30

KNOW ALL MEN BY THESE PRESENTS, that this Irrevocable Assignment, made and executed this 4 day of May, 1959, by JOSEPH A. GARFIELD, of Coral Gables, Florida, for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations in hand paid by James T. Benn, acting for and on behalf of 5410 Connecticut Ave. Corporation, a corporation organized and existing under the laws of the District of Columbia, the receipt and sufficiency whereof are hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said James T. Benn, acting for and on behalf of 5410 Connecticut Ave. Corporation, ALL MONEYS DUE AND TO BECOME DUE FROM GARFIELD AND SANKIN, INC. AND JULIUS SANKIN, INC., BOTH OF THE SAID ABOVE CORPORATIONS ORGANIZED AND EXISTING UNDER THE LAWS OF THE DISTRICT OF COLUMBIA, AND JULIUS SANKIN INDIVIDUALLY, with full irrevocable right and authority of the said James T. Benn, acting for and on behalf of 5410 Connecticut Ave. Corporation, to ask, to make demand for, collect, sue for, accept payment of, and give receipt, release and acquittance for said money.

IN WITNESS WHEREOF, Joseph A. Garfield has hereunto set his hand and seal this 4 day of May, 1959.

Signed, sealed and delivered
in the presence of:

Joseph A. Garfield
JOSEPH A. GARFIELD

Edna S. Durney
STATE OF FLORIDA) SS:
COUNTY OF DADE)

PTF Ex 35

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, JOSEPH A. GARFIELD, to me well known to be the person described in and who executed the foregoing Irrevocable Assignment, and acknowledged before me that he executed the same freely and voluntarily for the purpose therein expressed.

WITNESS MY HAND and of Miami, Dade County, Florida,
this 4 day of May, 1959.

Miami, Florida,
May 4, 1959

RECEIPT FOR STOCK CERTIFICATE

RECEIVED from JAMES T. BENN, acting for and on behalf of 5410 Connecticut Ave. Corporation, a District of Columbia Corporation, one (1) stock certificate representing two thousand shares of non-par value bearer common voting stock issued by International Timber Corporation, a Panamanian corporation.

The undersigned acknowledges receipt of said above two thousand (2,000) shares of stock which has been accepted by the undersigned in exchange for three (3) promissory notes in the aggregate amount of Eight Hundred Thousand Dollars (\$800,000.00); payor of said notes, 5410 Connecticut Ave. Corporation; payee of said notes, Joseph A. Garfield.

Further, the undersigned, Joseph A. Garfield, accepts the above stock certificate in exchange for the said three (3) notes and does hereby and herein acknowledge receipt of the said shares of stock as full, total and complete payment of the above three (3) promissory notes as more particularly set forth in the Joint Letter of Authorization to the Escrow Agent, The Riggs National Bank, Washington, D.C., dated May 4, 1959, and as set forth in the Exchange Agreement dated May 4, 1959, by and between 5410 Connecticut Ave. Corporation, a District of Columbia corporation, and Joseph A. Garfield.

Signed, sealed and delivered
in the presence of:

JOSEPH A. GARFIELD

Edna S. Downey
STATE OF FLORIDA)
COUNTY OF DADE) SS: U

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgements, JOSEPH A. GARFIELD, to me well known to be the person described in and who executed the foregoing Receipt for Stock Certificate, and acknowledged before me that he executed the same freely and voluntarily for the purpose therein expressed.

WITNESS MY HAND and official seal at Miami, Dade County, Florida,
this 4 day of May, 1959.

Edna S. Downey
Notary Public, State of Florida at Large
My Commission Expires July 9, 1962
Issued by American Surety Co. of N.Y.



District of Columbia

NUMBER

SHARES

IN GOD WE TRUST

5410 CONNECTICUT AVE.

District of Columbia

Washington, D. C.

~~This Certifies That~~

JAMES T. BENN

is the owner of One Hundred No-Par

Shares of the Capital Stock of

5410 CONNECTICUT AVE. CORPORATION

transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 3 day of June, 1959

James T. Benn
James T. Benn, President

SHARES

100

FACIT

J.A. 190

The shares set forth herein represent the shares set forth in stock power given to Joseph A. Garfield by James T. Benn.



By Public. Received. hereby set aside and transfer

of the Capital Stock represented by the within certificate and do hereby inventory, certify and appoint

to transfer the said stock in the books of the within named corporation, with full power of substitution in the premises

Witness my hand and seal this 23rd day of June 1891
Joseph A. Garfield
 Joseph A. Garfield

NOTICE THE SIGNATURE OF THE ASSIGNED
 MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE
 BACK OF THE CERTIFICATE IN ORDER TO BE VALID

INCORPORATED UNDER THE LAWS OF

District of Columbia



5410 CONNECTICUT AVE. CORPORATION

District of Columbia corporation

Washington, D. C.

~~This Certificate~~ **That**

JAMES T. BENN

is the owner of One Hundred no-par----- Shares of the Capital Stock of

-----5410 Connecticut Ave. Corporation-----

transferable only on the books of the Corporation by the holder thereof in person or by Attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF the said Corporation has caused this certificate to be signed by its duly authorized officers and its corporate Seal to be hereunto affixed this _____ day of _____ 1919

James T. Benn
James T. Benn, President

SHARES

---100---

PAGE

The shares of stock represented in this stock certificate are the same and one share of stock as set forth in an undated stock power assignment in favor of Joseph A. Garfield, delivered to Joseph A. Garfield this day, April 29, 1939, which stock power Joseph A. Garfield shall hold as further collateral security for payment in connection with the Garfield Apartment Building, Washington, D.C.



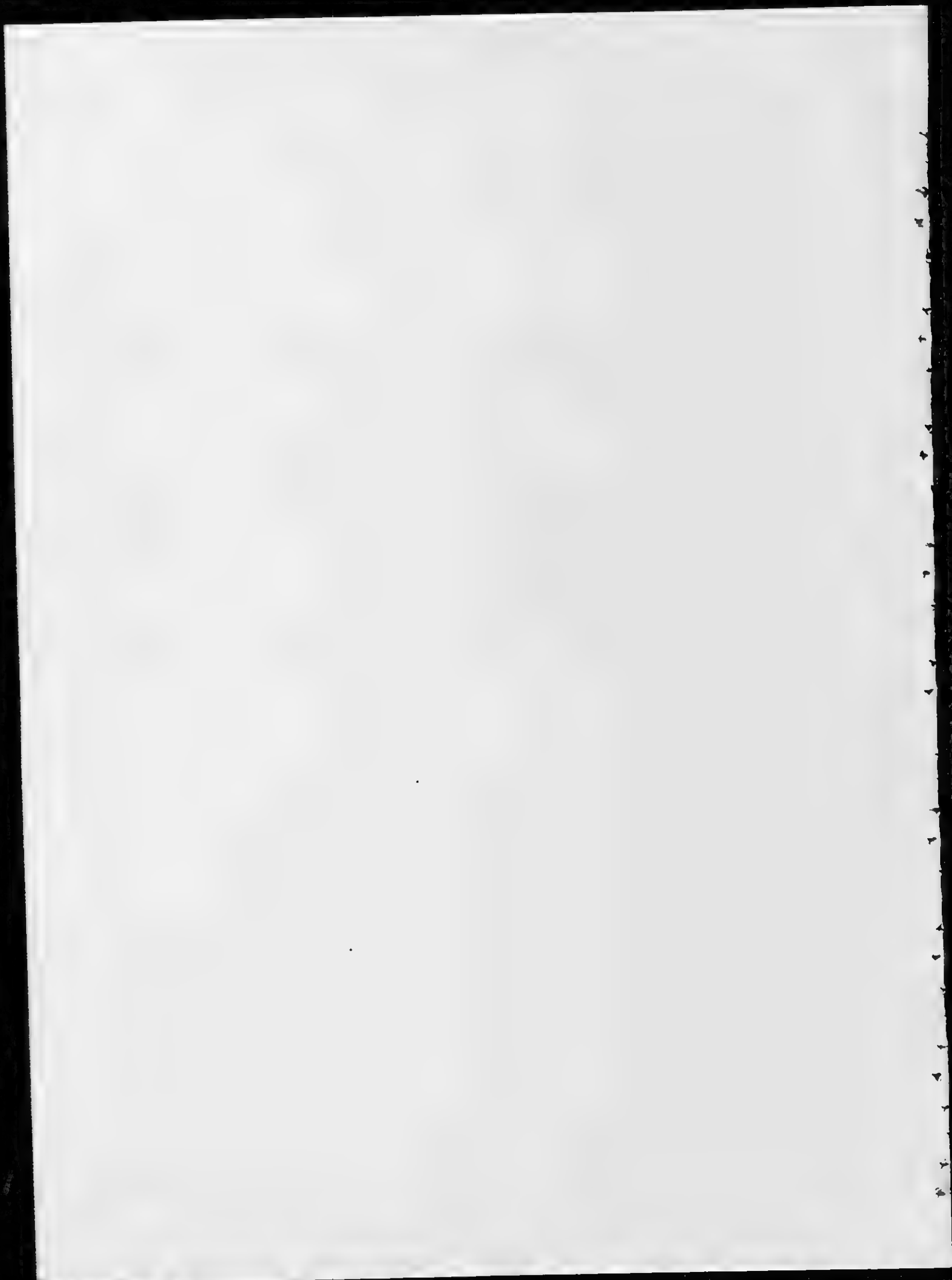
For Value Received, hereby sell, assign and transfer

one share of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

to transfer the said stock on the books of the within named Corporation with full power of substitution in the premises

Dated 1939
In presence of
James A. Brown

NOTICE: THE SIGNATURE OF THE ASSIGNEE
 MUST BE WRITTEN WITH THE NAME AS SHOWN ON THE
 FACE OF THE CERTIFICATE IN EVERY PARTICULAR WITHOUT
 ALTERATION OR ADDITION, OR ANY CHANGE SHALL BE VOID



\$ 60,000.00 WASHINGTON, D. C., April 19 19 59

ON DEMAND

IT

promise to pay

Due

JOSEPH A. GARFIELD

SIXTY THOUSAND and No/100

DOLLARS

Amount

for value received with interest at the rate of --- per cent per annum until paid

Each endorser of this note hereby waives presentment, demand, protest and notice of dishonor, and consents to any extension of time of payment to be made by the maker or makers without notice to him. In case this note shall not be paid at maturity, each maker and endorser severally promises to pay costs of collection, including a reasonable attorney's fee.

Payable at THE RIGGS NATIONAL BANK OF WASHINGTON, D. C.

Main Office, 1503 Pennsylvania Avenue, N. W.

5410 CONNECTICUT AVE CORPORATION

By:

James I Benn

President Pro-Tem

Interest

Total

No.

Address 1000 Shoreham Bldg., Washington, D. C.

R 136 Rev.

\$ 540,000.00 WASHINGTON, D. C., April 8, 19 59

or Before Dec. 1, 1959

it

promise to pay

Due

JOSEPH A. GARFIELD

FIVE HUNDRED FORTY THOUSAND and No/100

DOLLARS

Amount

for value received with interest at the rate of --- per cent per annum until paid

Each endorser of this note hereby waives presentment, demand, protest and notice of dishonor, and consents to any extension of time of payment to be made by the maker or makers without notice to him. In case this note shall not be paid at maturity, each maker and endorser severally promises to pay costs of collection, including a reasonable attorney's fee.

Payable at THE RIGGS NATIONAL BANK OF WASHINGTON, D. C.

Main Office, 1503 Pennsylvania Avenue, N. W.

5410 CONNECTICUT AVE CORPORATION

By:

James I Benn

President Pro Tem

Interest

Total

No.

Address 1000 Shoreham Bldg., Washington, D. C.

R 136 Rev.

\$ 200,000.00 WASHINGTON, D. C., April 21 19 59

On Demand

it

promise to pay

Due

the order of Joseph A. Garfield

Two Hundred Thousand and no/100

DOLLARS

Amount

for value received with interest at the rate of none per cent per annum until paid

Each endorser of this note hereby waives presentment, demand, protest and notice of dishonor, and consents to any extension of time of payment to be made by the maker or makers without notice to him. In case this note shall not be paid at maturity, each maker and endorser severally promises to pay costs of collection, including a reasonable attorney's fee.

Payable at THE RIGGS NATIONAL BANK OF WASHINGTON, D. C.

Main Office, 1503 Pennsylvania Avenue, N. W.

5410 CONNECTICUT AVE. CORPORATION

By:

James I Benn

President Pro-Tem

Interest

Total

No.

Address 1000 Shoreham Building, Washington, D. C.

R 136 Rev.

5410 CONNECTICUT AVE. CORPORATION

**1000 Shoreham Building
Washington 5, D. C.**

May 27, 1959

**The Riggs National Bank
Trust Department
1508 H Street, N. W.
Washington, D. C.**

**Attention: Mr. E. B. Shaw, Vice President and Trust Officer
Mr. W. S. Wiegeling, Trust Officer**

Gentlemen:

Pursuant to the telegram forwarded to you by Western Union on Tuesday, May 26, 1959, at 10:30 p.m., the contents of which are hereby explicitly confirmed and ratified as more specifically set forth hereinafter.

"You are hereby notified that you are irrevocably prohibited from delivering to Julius Sankin, his assignee or nominee, the two (2) stock certificates, to wit: one certificate representing 66 2/3ds shares of stock of Garfield and Sankin, Inc., and one certificate representing 66 2/3ds shares of stock of Julius Sankin, Inc., which you are now holding pursuant to certain Escrow Agreements dated April 8, and April 21, 1959, unless the terms and conditions as set forth in Agreement, dated March 14, 1959, are fully complied with, which said Agreement, dated March 14, 1959, is made a part and parcel by reference of the said Escrow Agreement, page 1, paragraph 3, dated April 8, 1959, and unless the terms and conditions as set forth in another Agreement, dated April 21, 1959, are fully complied with, which said Agreement dated April 21, 1959, is made a part and parcel by reference of the Escrow Agreement, page 1, paragraph 3, dated April 21, 1959.

"Further, you are irrevocably authorized and directed to deliver to Julius Sankin, his assignee or nominee, the said above two (2) stock certificates only on condition that Julius Sankin, his assignee or nominee, delivers to you for the account and benefit of 5410 Connecticut Ave. Corporation, the sum of Eight Hundred Thousand Dollars (\$800,000.00), which said amount represents the aggregate sum of three (3) promissory notes which you marked "Cancelled" and delivered to Benjamin H. Saunders, Esq.,

"2"

The Riggs National Bank
Trust Department
May 27, 1959
Page 2

acting for and on behalf of the 5410 Connecticut Ave. Corporation, on May 8, 1959. You were irrevocably authorized and directed in a joint letter of authorization, dated May 4, 1959, to deliver the said three promissory notes in the aggregate amount of \$800,000.00, to Mr. Saunders, as set forth above. In the same Joint Letter of Authorization, Joseph Garfield irrevocably acknowledged receipt of the full total and complete payment for the said three (3) promissory notes, which constituted full and complete payment for the said shares of stock referred to herein, and acknowledged that 5410 Connecticut Ave. Corporation is the owner of the two (2) said stock certificates that you are presently holding for 5410 Connecticut Ave. Corporation in escrow."

In connection with the responsibilities hereunder, it is expressly understood and agreed by the undersigned that paragraph 6 of the Escrow Agreements dated April 8, and April 21, 1959, be made a part and parcel of this letter of notice and authorization, as though said paragraph 6 were fully set forth herein.

Very truly yours,

5410 CONNECTICUT AVE. CORPORATION

By James T. Benn
James T. Benn, President

Received and Accepted this
27th day of May, 1959, at 10:05 A.M.

THE RIGGS NATIONAL BANK, TRUST DEPARTMENT

By Wm N. Higgins

A G R E E M E N T

THIS AGREEMENT dated this 26th day of May, 1959, by and between JAMES T. BENN, hereinafter referred to as "Seller" and HARRY W. LINK, JR., hereinafter referred to as "Purchaser Link", and SAMUEL J. BETOFF, hereinafter referred to as "Purchaser Betoff", and JOSEPH PARDO, hereinafter referred to as "Purchaser Pardo" and DINTY WARMINGTON WHITING, hereinafter referred to as "Purchaser S. R. WINN Whiting" and ~~MANUOCK KENTON CONELMS~~ WINN, hereinafter referred to as "Purchaser ~~NEIMS~~".

W I T N E S S E T H:


WHEREAS, Seller desires to sell and assign two hundred fifty (250) shares of no par value common-voting stock of 5410 Connecticut Ave. Corporation, a corporation organized and existing under the laws of the District of Columbia, Washington, D. C., and

WHEREAS, said above two hundred fifty (250) shares of stock represent all (100%) of the authorized, issued and outstanding shares of stock of 5410 Connecticut Ave. Corporation, and

WHEREAS, the above Purchasers, namely Purchaser Link, Purchaser Betoff, Purchaser Pardo, Purchaser Whiting and Purchaser Nelms, desire to purchase said two hundred fifty (250) shares of no par value common-voting stock of 5410 Connecticut Ave. Corporation for the purchase price of and upon the terms and conditions as hereinafter set forth:

NOW THEREFORE, in consideration of the premises and covenants and agreements hereinafter set forth, the Purchasers hereto do covenant and agree as follows:

1. Seller agrees to sell and assign by appropriate instruments to the Purchasers hereto, and the Purchasers hereto agree to purchase from the Seller the said two hundred fifty (250) shares of stock representing 100% of the authorized, issued and outstanding

*Defendant Julius Sankin Inc., Exhibit
No. 2, marked for identification*


shares of 5410 Connecticut Ave. Corporation under the terms and conditions set forth in the following paragraphs of this Agreement.

2. Purchasers hereto agree to pay to the Seller the agreed purchase price of Five Hundred Fifty Thousand Dollars (\$550,000.00), and the payment of said purchase shall be in the following form and manner:

(a)

<u>Name</u>	<u>Shares Purchased</u>	<u>Cost</u>	<u>Down Payment</u>	<u>Balance Due</u>	<u>Balance Payable as Follows</u>
MAXXXXXXXXXX XXXXXX	50	XXXXXXX	\$25,000X	\$85,000X	
S. R. Winn	50	\$110,000.	\$20,000.	\$90,000.	\$2,500.00 per each quarter, including interest at 5% per annum for the ensuing 5 years thereafter unpaid balance payable on demand.
Samuel J. Betoff	50	\$110,000.	\$25,000.	\$85,000.	"
Harry W. Link, Jr.	50	\$110,000.	\$30,000.	\$80,000.	"
Joseph Pardo	50	\$110,000.	\$15,000.	\$95,000.	"
Dinty Warmington Whiting	50	\$110,000.	\$20,000.	\$90,000.	"

(b) Said Purchasers hereto do hereby agree to pay to the Seller the down payment as set forth above and the balance due as set forth above shall be in the form of promissory notes made and executed by the respective purchasers hereto and made payable to the order of the Seller.

3. The Purchasers hereto have been apprised of the assets of said 5410 Connecticut Ave. Corporation and have examined the agreements, instruments and papers which are made a part and parcel hereof of this Agreement by reference as though fully set forth herein

in connection with the Seller's purchase of sixty-six and two-thirds (66-2/3) shares of stock of Garfield & Sankin, Inc. (owner of Garfield Apartment Building located at 5410 Connecticut Avenue, N. W., Washington, D. C.) and sixty-six and two-thirds (66-2/3) shares of stock of Julius Sankin, Inc. (General Contractor of said Garfield Apartment Building) from James T. Benn's predecessor in interest, namely Joseph A. Garfield - including Joseph A. Garfield's irrevocable assignment of all monies due or to become due from Garfield & Sankin, Inc., Julius Sankin, Inc., and Julius Sankin individually, and according to Goldwyn & Berlin, CPA, Washington, D. C., auditors for Garfield & Sankin, Inc., and Julius Sankin, Inc., the amount due as per their certified statement dated May 19, 1959 as of April 30, 1959 representing the sum of \$182,166.67.

4. The Seller does hereby give notice to the Purchasers hereto that they are purchasing said shares of stock as set forth above subject to a certain 30-day purchase option in favor of Julius Sankin, which option expires not later than May 30, 1959. Said option was originally given and granted by Joseph A. Garfield, predecessor in interest, unto Julius Sankin. Notice to Julius Sankin was effective as of April 29, 1959 to the effect that 5410 Connecticut Ave. Corporation purchased from Joseph A. Garfield the shares of stock in which Julius Sankin had a 30-day purchase option upon the same terms and conditions of 5410 Connecticut Ave. Corporation.

5. This Agreement shall be binding and inure to the benefit of the heirs, administrators, executors, successors and assigns of the Seller and the respective Purchasers hereto.

IN WITNESS WHEREOF, all of the parties hereto have set

their hands and seals in quadruplicate this 26th day of May, 1959,
in Washington, D. C.

WITNESSES:

Donna M. O'Connor
Ruth Ann Lewis

James T. Benn
JAMES T. BENN
Seller

Donna M. O'Connor
Ruth Ann Lewis

Harry W. Link, Jr.
HARRY W. LINK, JR.
Purchaser

Donna M. O'Connor
Ruth Ann Lewis

Samuel J. Betoff
SAMUEL J. BETOFF
Purchaser

Donna M. O'Connor
Ruth Ann Lewis

Joseph Pardo
JOSEPH PARDO
Purchaser

Donna M. O'Connor
Ruth Ann Lewis

Dinty Warmington Whiting
DINTY WARMINGTON WHITING
Purchaser

Donna M. O'Connor
Ruth Ann Lewis

Mark Kennedy
~~MARK KENNEDY~~ S. R. WINN
Purchaser

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

JULIUS SANKIN

Plaintiff,

vs.

5410 CONNECTICUT AVENUE CORP.,
et al.

Defendants.

Civil Action No. 1493-59

JAMES T. BENN

Plaintiff,

vs.

JANET GARFIELD

Defendant.

Civil Action No. 4002-60

TRIAL MEMORANDUM ON BEHALF OF JAMES T. BENN,
DEFENDANT AND CROSS-CLAIMANT (CIVIL ACTION
NO. 1493-59), AND AS PLAINTIFF
(CIVIL ACTION NO. 4002-60)

Plaintiff, Julius Sankin, vs. Defendant,
James T. Benn (Civil Action No. 1493-59)

According to the testimony of Sankin, there were no negotiations between him and Benn relative to the purchase and sale of the 66-2/3% stock interest of Joseph A. Garfield in Garfield & Sankin, Inc., and Julius Sankin, Inc., which Sankin is seeking, among other things, to acquire in this action at a fair market price by his complaint grounded on allegations of fraud.

Standing alone, no cause of action may be maintained by Sankin against Benn.

The sole means by which Benn was made a defendant in these proceedings was to create an issue of fraud between plaintiff Sankin and his associate defendant Joseph A. Garfield. The alleged fraud consisted of a confession by Garfield, as a repentant sinner,

implicating the purchaser of his 66-2/3% stock interests in the two corporations. In the course of Garfield's confession the name of James T. Benn was asserted.

Sankin, by alleging that a conspiracy to defraud him transpired as a result of Garfield's confession of his own fraud, was, solely by this device, able to name Benn as a party defendant.

The pre-trial order, depositions and pre-trial exhibits unequivocally disclose that defendant Garfield, the repentant sinner, agreed to indemnify Sankin for all costs and expenses of this litigation. Sankin stated that up to now the amount is about \$32,000.00.

The defendant Garfield is admittedly in court without clean hands. His indemnification arrangements with Sankin, and Sankin's acquiescence with the terms, makes it incumbent upon the Court to examine into the arrangement and dismiss Sankin's cause for reasons of jurisdiction.

In Gardner vs. Goodyear Dental Vulcanite Co., 82 U.S. (Wall.) 141, the Supreme Court held that where parties to a suit have compromised and settled all differences between them with the understanding that the suit shall go on to a final hearing and determination as if the compromise had not been made, and one party paid the counsel employed for both sides, the suit is collusive. Where such facts become known to the Supreme Court after its decision in the case, its decree was vacated, its mandate to the Circuit Court recalled, and the motion to dismiss was granted. This Court should do no less.

Again, in United States, et al vs. Johnson, 319 U.S. 302, the Supreme Court citing Gardner vs. Goodyear Dental Vulcanite Co., et al. supra, stated, among other things, that whenever in the

course of litigation it appears that there was no genuine adversary relationship between the parties the Court may dismiss the cause without entering judgment on the merits and it was the Court's duty to do so on grounds of public policy where it appeared the suit was conducted only under the domination of one of the parties. In this case, Garfield is the real party in interest and has no standing in equity to maintain an action against Benn. Garfield is using Sankin as a vehicle for the institution of this collusive suit. For these reasons Sankin's complaint should be dismissed.

Cross-Claim of Defendant, Joseph A.
Garfield, vs. Defendant, James T. Benn
(Civil Action No. 1423-59)

Garfield is a party defendant to this action solely by reason of his confessed fraud against his associate Sankin. In equity and good conscience he cannot be heard to complain against defendant Benn or seek relief through the equity Court against Benn by reason of his confessed unclean hands. This would be so whether it be in this action where Garfield is a cross-claimant or in an independent suit against Benn. It is elementary that no course of action will arise out of an admitted illegal transaction.

Cross-Claim of Defendant, James T. Benn,
vs. Defendant, Joseph A. Garfield (Civil
Action No. 1439-59), and Plaintiff, James
T. Benn vs. Defendant, Janet Garfield
(Civil Action No. 4002-60)

Issues Involved

- (1) Is Benn entitled to recover the sum of \$60,000.00 stolen from him by the Garfields, and
- (2) Were receipts or releases, stock certificates, or other documents issued to the Garfields by Benn invalid because they

Facts

Prior to May 8, 1939, Defendant, James T. Benn, acting for and in behalf of Defendant, 5410 Connecticut Ave. Corp. (Purchaser), entered into a series of agreements and instruments with Defendant, Joseph A. Garfield (Seller). The documentation concerned in this transaction revolves around the purchase and sale of a two-thirds stock interest in two corporations, Garfield and Sankin, Inc., and Julius Sankin, Inc., both District of Columbia corporations. Also included therewith is an irrevocable assignment entered into between 5410 Connecticut Ave. Corp. and Joseph A. Garfield dated May 4, 1939, concerning itself with money loans and advances made by Joseph A. Garfield to Garfield and Sankin (a partnership), Garfield and Sankin, Inc., a District of Columbia corporation, Julius Sankin, Inc., a District of Columbia corporation, and Julius Sankin, individually. This whole transaction was escrowed with the Trust Department, Riggs National Bank, Main Office, Washington, D. C. Plaintiff, Julius Sankin, was made aware of the transaction and all the documents in connection therewith prior to May 8, 1939, with the exception of three cancelled promissory notes aggregating \$800,000.00 made by 5410 Connecticut Ave. Corp. in favor of Joseph A. Garfield, and these three (3) notes were exhibited to Plaintiff Sankin on May 15, 1939. The aforesaid three notes aggregating \$800,000.00 were marked "cancelled" and were dated by the Trust Department of the Riggs National Bank on May 8, 1939, thereby concluding the whole transaction between 5410 Connecticut Ave. Corp. and Joseph A. Garfield. About 9:30 A.M. on May 8, 1939, the cancelled notes were delivered in hand by the Riggs Bank Trust Department to Benjamin H. Saunders, then Secretary of 5410 Connecticut Ave. Corp., and James T. Benn.

Defendant Garfield and his wife, Defendant Janet Garfield, make their home in Miami, Florida. During the times pertinent to this action, either or both of the Garfields would travel with some frequency between Miami and Washington, D. C.

On about May 7, 1959, however, the Garfields were at home in Miami. The Garfields called Benn several times urging Benn to come to Miami. Their urging indicated anxiety. Tension seemed to be mounting in the Garfield home because of Herman Mankes' (Garfield's uncle and Sankin's father-in-law) presence there. Garfield declined to tell Benn the basis for his apparent anxiety but urged him to come to Miami at once because Mankes was making trouble at his house.

On May 8, 1959, at about noon, Benn departed Washington for Miami where he arrived in the early afternoon. Upon arrival, Benn was met at the airport by Mrs. Garfield. He informed her that he had an urgent appointment with her husband. Mrs. Garfield insisted that Benn go with her to keep another appointment before seeing her husband. Benn declined, and thereupon hired his own U-Drive-It automobile and drove to Mr. Garfield's house in Coral Gables, Florida, where he arrived a short time later.

When Benn arrived at Garfield's home, there was no indication of tension or anxiety on the part of Garfield, nor was Herman Mankes present. Garfield opened the conversation by inquiring whether Benn had signed the minutes of the annual stockholders and directors meeting of both corporations and the corporations' income tax returns. Defendant Benn declined to sign the annual minutes of the stockholders and directors meeting of the two corporations and stated as a reason that the minute books did not reflect any authority for the expenditures and disbursements in excess of \$2 million dollars of FIA insured funds. Defendant Benn insisted that the previous officers and directors

make and execute proper corporate resolutions reflecting those expenditures and disbursements and that defendant Bann would thereafter adopt them and make them a part of the aforesaid annual meeting of the two said corporations. Bann declined signing the income tax returns for the reason that he had been advised by his tax counsel (Benjamin H. Saunders of Hamel, Morgan, Park and Saunders) to refrain from executing the tax returns under he, Mr. Saunders, would request a complete audit from G. F. Graham & Co., certified public accountants, Washington, D. C., whom Mr. Saunders had engaged to make the audit.

At about 4:00 P.M. Janet Garfield arrived and joined a discussion wherein Garfield was showing Bann some plat plans and some building plans. All seemed quiet and serene up to that point.

Shortly thereafter the Garfields' tempers began to flare in Bann's presence. Their loud exchanges of epithets reached such volume that Garfield would go to an adjacent room and request Bann to follow him. This pattern of loud, heated exchanges between the two Garfields repeated itself several times. By hindsight, Bann came to learn that these two actors were staging these domestic scenes as a setting for the purpose of stealing Bann's briefcase. Garfield moved from room to room to get away from Janet. Garfield finally told Bann that he considered Bann disrespectful in his, Garfield's, house. When Bann inquired as to the basis for such a remark, Garfield said in substance and effect, viz, -- "By carrying your briefcase from room to room. Nobody here is going to steal it from you."

With that, Bann placed his brief case in the den against the wall. Shortly thereafter, Garfield's four-year-old daughter came

into the den and wanted Benn to accompany her (the daughter) so she could show Benn her doll at another part of the house. She said her daddy wanted her to show the doll to Benn.

Benn followed the child to the other end of the house and upon Benn's return to the den he noticed that the brief case was missing.

Benn asked Garfield where it was and he was advised that Janet Garfield had taken it and left with it.

From a window in the den, Benn saw Janet Garfield running toward her automobile carrying his brief case. She got into her car and sped off. Benn ran out after her to retrieve his brief case, but she was just going out of sight.

Benn returned to the Garfield house, where he was assured by Garfield that he would be completely responsible for his wife's acts and for Benn not to worry.

Benn then advised Garfield that the brief case contained in excess of \$100,000.00 in cash and in addition all the records of 3410 Connecticut Ave. Corp. and other papers whose identity he could not recollect.

Garfield made no effort to have his wife return. He said she was going to a friend's house and that he would just have to wait for her to return.

As they sat in Garfield's home, Garfield said he was sorry he had to steal the brief case, but that he had no alternative, that it would be returned immediately, as soon as Mr. Benn signed the referred to annual stockholders' and directors' minutes and also sign the income tax returns for both corporations.

Benn respectfully declined, indicating Saunders, Secretary of 3410 Connecticut Ave. Corp., and the accounting firm he engaged, would have to decide those matters. Garfield insisted

that Benn should get rid of Saunders and his accounting firm because he (Garfield) would give Benn all the legal and accounting talent he needed. Benn declined, commenting that he was already having enough difficulties with the Internal Revenue Service. This kind of conversation was repeated off and on in Garfield's home until about 1:00 A.M., Saturday, May 9, 1959, which was the time when Janet Garfield arrived. Her opening remark was, "Did he agree to sign the minutes and the returns?" To which Garfield replied, "Not yet."

This pattern of conversation continued and the Garfields went off to bed. Benn remained in the den. About 9:00 A.M., May 9, 1959, the same campaign followed. Garfield bargained the return of Benn's brief case for signatures on the annual minutes and the tax returns. Benn insisted that these should be passed upon by Saunders and the accounting firm.

On May 9, 1959, Garfield and, on occasions, his wife, would repeatedly ask Benn why he had not called the police. On at least five occasions either Garfield or his wife, Janet, would dial the phone number for the Police Department and then hand the telephone instrument to Benn, tauntingly urging Benn to speak to the police. Benn refused it on those particular occasions, and Garfield accusingly remarked that Benn could ill afford to call the police because the ensuing publicity would put the Internal Revenue on notice that Benn had \$120,000.00 which Benn could not explain; that he would have to account for the money; that Garfield was certain that the money did not belong to Benn but to others who also could ill afford to be exposed since they, in turn, could not account for the money.

All of Garfield's cloak and dagger dramatics backfired when at about 2:00 P.M. on Saturday, May 9, 1959, after too much

taunting, prodding and goading by the Garfields, Benn, to their amazement and chagrin, accepted the telephone instrument after the police number had been dialed by one of them, and announced in clear tones to the police that a robbery had been committed involving in excess of \$100,000.00 and some valuable documents. Benn gave the address of the Garfield house and hung up. Within minutes, the police began to pour into the Garfield house from all sides and through the garage. The police demanded to know who reported the robbery and Benn asserted that he did. Benn informed the officers that he was in Garfield's house as a guest at their invitation following numerous phone calls to Benn in Washington, D. C.; that Benn arrived in Miami early Friday afternoon, May 8, 1959, and about an hour later the Garfields stole his brief case with the aforesaid contents. Benn described how the Garfields carried off the ruse by using their four-year-old daughter to distract Benn with her toys. He further told the police that Garfield admitted he knew that his wife took it and told Benn not to worry.

Shortly after the complaint was made, the Sergeant of Detectives and Garfield closeted themselves in the den while Benn and Mrs. Garfield and the uniformed officers remained in the kitchen. The Sergeant and Garfield re-entered after a brief period when the Sergeant stated that he was assured that it was a civil dispute and that the Garfields' and Benn's attorneys would take care of it.

While the Sergeant and Garfield were closeted, a uniformed officer questioned Janet Garfield. She first claimed that she had no knowledge of any robbery and after further interrogation

admitted the robbery. The officer forbade her to leave the house. She then told the officer that the brief case was at their attorney's home, after the uniformed policeman demanded that she return it. Mrs. Garfield said that it would take over an hour to go and return from her attorney's home. The police left after the Sergeant announced that it was a civil matter. Garfield assured the police that the matter would be settled. After the police had departed, Garfield told Benn that Benn should thank him for not charging Benn with robbery or something, as the Sergeant of Detectives was a very good friend of his.

Thereafter, on the same day, Garfield decided that Benn would have to execute some stock certificates in accordance with his instructions as a condition for the return of his brief case. Benn and Garfield proceeded to the office of Mrs. Downey, a public stenographer, at the Columbus Hotel in downtown Miami for that purpose. Janet went in another direction to get the brief case from her attorney. It was understood that all would meet at Mrs. Downey's at the Columbus Hotel.

At Mrs. Downey's office in the Columbus Hotel on May 9, 1939, Garfield insisted that as a condition for the return of the brief case, Benn would have to execute jointly with him an agreement, the effect of which would authorize the Riggs Bank to release the stock certificates of Garfield and Sankin, Inc., and Julius Sankin, Inc., which the bank held, subject to Sankin's option to purchase. Benn signed the agreements under the duress of the refusal to return the money the Garfields had stolen, plus all of Benn's files. Thereafter, Mrs. Garfield brought the brief case into Mrs. Downey's office and tossed it in Benn's lap. Benn discovered that there was only \$60,000.00 in cash in the brief case

and that his files were still missing. Mrs. Garfield said she would give him the remaining balance of \$60,000.00 and his files when Benn did what the Garfields demanded. The Garfields instructed Benn to make out a stock certificate assigning to Joseph A. Garfield 100 shares of 3410 Connecticut Ave. Corp. stock. Thereafter, his wife, Janet Garfield, wanted a stock certificate also for 100 shares in her name. A few minutes later, Garfield wanted another stock certificate in his name for the same amount.

Thereafter, Benn and the Garfields went to Garfields' home on the promise of getting his \$60,000.00 from them. There, Garfield demanded Benn fill out a release stating that Benn had received the brief case and its contents. Benn did this on the representation that the \$60,000.00 would be returned. Garfield said that the receipt was improper and that the figure of \$120,000 should be entered. Benn reminded him that he had only received \$60,000.00 and Garfield replied, "You put \$120,000.00 on the receipt and you will get the rest of your money." Benn complied and handed the receipt to Garfield. Then Garfield said he wanted "Don" (Nicholson) to approve the aforesaid "3410" certificates first before returning the \$60,000.00.

Benn was assured that on the following day, Sunday, May 10, 1959, the remaining \$60,000.00 would be returned. Benn met with Garfield at his house on the morning of May 10, but Garfield had not yet received Nicholson's approval. On Monday, May 11, 1959, Garfield demanded another certificate for 100 shares of "3410" made out to Janet, his wife, and then he would surely deliver the \$60,000.00 balance. After this, Garfield said their attorney wanted another stock certificate made out to Garfield which was done at Mrs. Downey's office in the Columbus Hotel the following day, May 12, 1959. Following this, Garfield assured Benn that as

soon as his attorney approved it, he would surely return the \$60,000.00 he had stolen. Garfield instructed Benn to call Garfield that evening and the matter would be concluded. Benn called Garfield as instructed, but Garfield was not available. On Wednesday morning, May 13, 1939, Benn boarded a plane at Miami and departed for Washington, D. C.

In summary, Benn signed a joint letter of authorization to the Riggs National Bank to release the Garfield and Senkin, Inc., and Julius Senkin, Inc., stock as well as a receipt for the brief case dictated by Garfield on May 9, 1939; despite this, the \$60,000.00 was not returned. Nor was the \$60,000.00 returned after executing the stock certificates demanded by both Garfield on May 9, 10, 11, 1939, and the last one on May 12, 1939. The last excuse was that his attorney, Nicholson, had not yet approved the stock certificates.

Discussion

(1) The Court must determine the issue of fact whether the Garfields returned \$120,000.00 or \$60,000.00 to Benn.

(2) There can be no question but that Benn was under duress when the various documents and certificates were executed by him at Garfield's direction. Benn stood to lose \$120,000.00 if he did not comply with Garfield's demands. The amount of money involved is considerable. Weighing this against the methods used by these people of demonstrated immorality, coupled with their unreasonable use of the Police Department, we are led without distraction to the conclusion that Benn was at the mercy of his malefactors.

In these circumstances Benn had no means of immediate relief from the actual duress than by compliance with Garfield's demand.

The doctrine seems well established that where a party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner except upon compliance with an unlawful demand, a contract made by the owner under such circumstances to emancipate the property is to be regarded as made under compulsion and duress. 17A Am. Jur. 562.

The question in each case where duress is asserted turns on whether the person acted upon (Benn) by threats of the person claiming the benefit of the contract, for the purpose of obtaining the contract, as to be bereft of the quality of mind essential to the making of the contract and was the contract thereby so obtained. Under this theory, duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. Ibid., p. 572. See, also, Grimshaw vs. Zithrow, 248 F.2d 896 (CA 5).

In these circumstances, Benn had no alternative but to comply with Garfield's requirements.

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Certificate of Service

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN,

Plaintiff,

vs.

5410 CONNECTICUT AVENUE
CORPORATION, etc., et al.,

Defendants.

CIVIL ACTION NO. 1493-59

DEFENDANT BENN'S BRIEF ANSWER TO
PLAINTIFF'S BRIEF ON COMPLAINT

February 5, 1965

James T. Benn
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* Denotes authorities upon which Benn relies in support of his position or in refutation of the allegations by plaintiff.

JULIUS SANKIN,

V8.

Defendants.

Civil Action No. 1493-59

Introductory Statement: Inasmuch as this brief has been ordered by the Court as a post-trial brief, it necessarily contains questions of law and fact and, in some instances, presumes facts which have yet to be found.

The questions presented in this cause now before the Court for its decision both on the facts and the applicable law to defendant Benn's position are the following:

1. Whether the alleged shareholders agreements between Sankin and Garfield created the rights now claimed by Sankin before the purchase of the stock here involved from Garfield by Benn-5410 Corporation.

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3. Whether any such agreements can be binding on third parties if the restrictions are not inscribed on the stock certificate itself.

4. Whether an uncorroborated and implausible tale of conspiracy should be deemed sufficient notice to defeat a bona fide purchaser for value.

5. Whether Sankin, assuming the validity of the 30-day options, (a) was unresponsive to 5410 Corporation's offers to exercise the options; (b) exhausted his options prior to May 26, 1959, (c) failed in law and equity to exercise his options on May 26, 1959.

6. Whether Sankin has standing or is entitled to relief for failure to join Garfield & Sankin, Inc., Julius Sankin, Inc., and Don Nicholson as necessary and indispensable parties.

7. Whether the presumption of value given by a bona fide purchaser can be overcome by a mere recitation that such value is uncorroborated.

8. Whether a plaintiff who has indulged in a fraudulent conspiracy to defeat a bona fide purchaser is entitled to relief against such purchaser.

B. Questions of Fact:

1. Whether any agreement as broad as that now asserted against Benn-5410 Corporation was in existence before the sale of the stock by Garfield to Benn-5410 Corporation.

2. Whether, in view of the acknowledged lack of compliance with the statute of the District of Columbia, Benn-5410 Corporation had any notice of Sankin's supposed rights before they gave value for the stock.

3. Whether Sankin's "option" right was anything more

than a right to buy the stock on the exact same terms as Benn-5410 Corporation had bought.

4. Whether Sankin knowingly failed or refused to exercise such rights even when the opportunity was offered to him by 5410 Corporation.

5. Whether Sankin ever had any intention of exercising rights upon the same terms as 5410 Corporation.

6. Whether, even if Sankin had purported to exercise his option, it would have been a bona fide attempt in view of the fact that he has acknowledged to this Court his disinclination to pay the \$800,000 in notes.

7. Whether any conspiracy existed between Garfield and Benn-5410 Corporation.

8. Whether any conspiracy exists between Sankin and Garfield to defraud Benn-5410 Corporation.

COUNTER-STATEMENT OF THE CASE

This is an action for recovery of money damages and injunctive relief arising out of the denial of plaintiff's alleged rights in certain corporate stocks (Plaintiff's Complaint). The plaintiff, Julius Sankin (Sankin), is a long-time partner and cousin by marriage of defendant Joseph Garfield (Garfield).

During early 1956, plaintiff and defendant joined together in a venture to purchase land and construct an apartment house on a site at 5410 Connecticut Avenue, N. W., Washington, D. C. (4 Tr. 582)

On April 17, 1958, with a view toward limiting their personal liability on the project, Sankin and Garfield formed two (2)

A R G U M E N T

- I. ALL CASES SUPPORTING PER SE VALIDITY OF AGREEMENTS RESTRICTING THE ALIENATION OF STOCK INVOLVE SITUATIONS WHERE THE RESTRICTION HAS BEEN INSCRIBED EITHER ON THE CERTIFICATE OF INCORPORATION, OR IN THE BY-LAWS, OR ON THE STOCK CERTIFICATE, OR A COMBINATION OF THESE.

Sankin's brief lay stress on the fact that such agreements as those involved herein are not invalid per se, and cites authority therefor.

In the case of Hopwood v. Topsham Telephone Co., 132 A.2d 170, Hopwood purchased two shares of telephone stock. He brought suit in equity against the company and its officers to compel them to transfer title to him of the stock and issue a new certificate in his name, though he had not complied with the by-law of company requiring that stock be first offered for sale to Board of Directors for company or to directors. The court raised the following question:

"Can notice take the place of compliance with the statute?"

This is because the company alleged that the plaintiff had notice and knowledge of the restriction. There are authorities which say that the answer to said question is "No." Notably among these is Costello v. Farrell, 234 Minn. 453, 48 N.W. 2d 557, 561. 29 A.L.R. 2d 890. In considering this problem, the Supreme Court of the State of Vermont held that the restriction of the by-law was of no force and effect though buyer had knowledge and notice thereof, where such by-law was never embodied in written, printed or stamped on stock certificate as required by

statute and by-law of company.

Actual notice and knowledge on part of buyer of the restriction of a by-law on the transfer of shares of stock cannot take the place of compliance by corporation with statutory provision that there shall be no restriction on the transfer of shares represented by certificate by virtue of the by-laws of corporation or otherwise unless restriction is stated on the certificate.

The court further held if the authors of the Uniform Act and the legislature had intended that there should be no restriction upon the transfer of shares represented by a stock certificate by virtue of any by-laws of the corporation, unless the restriction were stated upon the certificate, should be limited to a purchaser for value in good faith without notice of the restrictive by-law, they undoubtedly would have said so. They simply said that there should be no restriction unless the restriction was stated upon the certificate.

Section 15. of the Uniform Stock Transfer Act declared their purpose to be 'TO MAKE CERTIFICATES OF STOCK SO FAR AS POSSIBLE THE SOLE REPRESENTATIVES OF THE SHARES WHICH THEY REPRESENT.'

When Garfield refused to state the restriction upon the stock certificates, Sankin and Garfield's minds never met and, therefore, there was no assent.

A reference to 65 A.L.R. 1161, particularly at page 1168, et seq., reveals that in each of the cases where a restrictive agreement has been upheld, such restriction has been inscribed in at least one of the following places:

- a) on the certificate of incorporation.
- b) In the By-Laws.
- c) on the stock certificates.

None of these was so marked in the instant case. See:

Sterling Loan & Invest. Co. v. Litel 75 Colo. 34, 223 Pac. 753;
Bloomingtondale v. Bloomingtondale, 107 Misc. 646, 177 N.Y. Supp. 873, under IV. infra;
Moses v. Soule, 63 Misc. 203, 118 N.Y. Supp. 410, 136 App. Div. 904, 120 N.Y. Supp. 1136;
Lawson v. Household Finance Corp., Del. Ch., 147 Atl. 312;
New England Trust Co. v. Abbott, 162 Mass. 148, 27 L.R.A. 271, 38 N.E. 432;
Baumohl v. Goldstein, 95 N.J. Eq. 597, 124 Atl. 118;
Farmers' Mercantile & Supply Co. v. Laun, 146 Wis. 252, 131 N.W. 366;
Model Clothing House v. Dickinson, 146 Minn. 367, 178 N.W. 957;
Hassel v. Pohle, 214 App. Div. 654, 212 N.Y. Supp. 561.

Furthermore, it has been consistently held that restrictions on the alienation of stock are regarded with disfavor, and are to be strictly construed. See: 2 A.L.R. 2d 748;

Oakland Scavenger Co. v. Gandi, 51 Cal. App. 2d 69, 124 P2d 143;
McDonald v. Farley & L. Mfg. Co., 226 Iowa 53, 283 NW 261;
Guaranty Laundry Co. v. Pulliam, 198 Okla. 667, 181 P2d 1007, 2 ALR2d 738;
Re Polson Iron Works, 3 Ont. Week N. 1269, 4 DLR 193 (statute)

In this regard it should be noted that the May 1, 1958, agreements were made binding on the "heirs and assigns" of either party, so that construing the agreement in its ordinary meaning the only right which either party (Garfield or Sankin) had was to buy the stock from a purchaser, such as Benn-5410 Corporation, within thirty (30) days from the Garfield sale to Benn-5410 Corporation. This, Sankin adamantly refused to do and, thereby, deprived himself of any right he had in the stock.

II. SECTION 15. OF THE UNIFORM STOCK TRANSFER
ACT PROTECTS PURCHASERS WITH OR WITHOUT
NOTICE.

Following the theory that all statutes providing for notice giving provisions (such as recording acts) were expressly to avoid the complex which the old equitable and legal rules involving notice, actual, constructive or implied, the overwhelming weight of authority is that a provision restricting alienation of stock which is not inscribed on the stock certificate when is required by the Uniform Stock Transfer Act is unenforceable.

A leading case is Costello v. Farrell, 234 Minn. 453, 48 N.W. 2d 557, 29 A.L.R. 2d 890, which is virtually on all forms with the instant case. There, a stock restriction was sought to be enforced against a purchaser for value. There was conflicting evidence as to whether or not the purchaser had been verbally informed of the restriction. The Court had no trouble striking down the restriction and used the following language:

' "The language of the statute is plain. There is no ambiguity. As applied to the facts of the instant case, it states in effect that there shall be no restriction upon the transfer of the shares represented by certificate No. 87 of the bottling company by virtue of By-Law 36 unless the restriction is stated upon the certificate. It would therefore naturally follow, it would seem, that By-law 36 is not binding upon Mrs. Farrell, since there is nothing on the certificate to call attention to the restriction.' The appellate court rejected the plaintiff's contention that since the defendant had knowledge of the restrictive bylaw at the time she received the certificate from the bank, she was bound by it, pointing out that the statute provided unequivocally that there should be no restriction on the right to transfer stock unless 'the restriction is stated upon the certificate,' and that to uphold the plaintiff's contention would require interpreting the statute as though it also included the following clause, 'or unless the certificate has been sold to a purchaser who is not a purchaser for value in good faith without notice of any such restrictive by-law.' The court noted that the words,

'for value in good faith, and without notice,' had been used in three other sections of the Uniform Stock Transfer Act and held that if that added qualification had been intended in Section 15 it would have been so stated. The court held, therefore, that it was immaterial whether or not the defendant was a purchaser for value in good faith, without notice of the restriction."

Many other cases support the same line of reasoning.

In the case of Hopwood v. Topsham Telephone Co., 132

A. 2nd 170, the court ruled that notice cannot take place of compliance with the statute and that actual notice and knowledge on part of a stock purchaser of the restriction of a buy-law restricting the transfer of shares of stock cannot take the place of compliance by corporation with statutory provision, that there shall be no restriction on the transfer of shares represented by certificate by virtue of the by-laws of corporation or otherwise unless restriction is stated on the certificate. The court further held that if the authors of the Uniform Act and the legislature intended that there should be no restriction upon the transfer of shares represented by stock certificate unless the restriction where stated upon the certificate, should be limited to a purchaser for value in good faith without notice of the restrictive by-law, they undoubtedly would have said so. They simply said that there should be no restriction unless the restriction was stated upon the certificate.

In the case of Age Publishing Co. v. Becker, 110 Colo.

319, 134 P2d 205, the trial court was upheld in having sustained a demurrer to the corporation-defendant answer to a writ of mandamus compelling the corporation to put the purchaser on its book as a stockholder; the ground for sustaining the demurrer was that the corporation had concededly failed to meet the statutory requirement that the restriction must be stated on the stock certificate. The court in Age expressly distinguished Doss v.

Yingling, on which Sankin relies so heavily, by virtue of fact that defendant Yingling was the president of the corporation and should not be allowed to invoke the statute as an excuse for violating his agreement. Significantly, the plaintiff in Doss v. Yingling was acting for the stockholders to enjoin any prospective transfer of the stock. There was no innocent purchaser involved and the relief sought was only against the defaulting signatory Yingling. It should be noted further that Doss v. Yingling involved a corporate by-law restricting the transfer of stock of a corporation that had been organized in 1911, and between that time and 1923, when the Uniform Stock Transfer Act was adopted in Indiana, there had been several transfers of stock in accordance with the by-law, and that throughout the intervening years Yingling, as president, original incorporator and original stockholder, had sought to invoke the by-laws against the said transfers of stock during the intervening years between 1911 and 1923. Yet, when Yingling's own stock became involved, he sought to excuse himself from the by-law restriction that he had theretofore invoked against all others by relying on the newly adopted Uniform Stock Transfer Act. Quite justly, the maxim that "He who seeks equity must do equity" was invoked against him. The dissimilarities of the Doss v. Yingling case from the instant case are quite obvious.

The same distinctions apply to Baumohl, et al., v. Goldstein, et al., 124 A 118, also relied on by Sankin. Injunctive relief to prevent transfer was the issue; there was no indication of the intervention of a purchaser who had consummated his purchase.

The strictness of the mandate contained in Section 15. of the Uniform Stock Transfer Act has been upheld in many other cases.

In Security Life & Accident Insurance Co. v. Carlovitz, 251 Ala. 508, 38 So 2d 274, the court rejected the argument that a By-Law even though invalid could be enforced against the stockholder who had adopted it, pointing out that the restriction was not contained on the stock certificate and was therefore invalid. Similar reasoning was used in Weber v. Lane, 315 Mich. 378, 24 NW 2d. 418. Again, in Peets v. Manhasset Engineers, 68 NY S2d 338, the court denied the effectiveness of an agreement between the stockholders recorded in the corporate minutes, that they granted each other a 90 days option before selling to an outsider, because the outstanding stock certificates had not been replaced by new certificates showing the restriction on their faces. Further in Re: Magnetic Mfg. Co. 201 Wisc. 154, 229 NW 544, the court struck down a restriction not inscribed on the stock certificates where it was clear that the prospective purchaser who was connected with a competing company, intended to use the stock to harm the corporation.

From all the foregoing , it seems abundantly clear that the failure to have the restrictions involved herein inscribed on the stock certificates is an absolute bar to Sankin's claim herein by virtue of the statutory requirement.

In Roberts v. Whitson (Tex. Civ. App.), 188 SW 2d, 875, 45 A.L.R. 2d 822, is a case which meets or parallels the instant case on all fours insofar as the agreements (Plf.'s Ex. 2 and 3) are concerned. A stockholders' agreement providing that they should vote together on corporate matters was held invalid on the ground that it provided, also,

a) That in case of disagreement between the stockholders, a board of arbitration should be appointed and the stock voted according to their decisions; this provision the court ruled, made the agreement violative of the principle that stockholders have a duty to use

their voting power for the best interests of the corporation, and cannot agree to combine in such a way as to place their voting power in others, thereby disqualifying themselves to perform his duty.

The invalidity of a contract between two stockholders in a corporation (who were the only stockholders), specifying that each should vote for the election of the other, as a director of the corporation, was held in Lothrop v. Goudeau, 142 LA. 342, 76 So. 794, 45 A.L.R. 2d 822, to be so clear, under familiar principles of law, as not to require discussion. In support of its ruling the Louisiana Court cited West v. Camden, 135 US 507, 3A L ed 254, 10 S Ct. 838, in which it was held that a contract with a president of a corporation providing that a specified individual should be permanently retained as vice president of the corporation was void as against public policy.

The case of Johnson v. Spartanburg County Fair Asso., 210 SC 56, 41 SE 2d 599, 45 A.L.R. 2d 823, is to be noted for its dictum to the effect that an agreement between stockholders to vote in a specified manner at some particular is invalid as against public policy.

The creation of a dummy board of directors, or a sterilized board of directors is usually held to be void. A disproportionate voting right, as in the case at bar, would certainly cause damage, since a one-third stock ownership would be allowed to vote equal to a two-third stock ownership, since the alleged agreements (Plf.'s Exs. 2 and 3) are not definite as to the term of existence; which would create for the parties thereto an agreement against the doctrine of perpetuity. The said agreements are not for any object or purpose calculated for the best interest of the corporation. The separation of voting rights from stock ownership

is frowned upon and will be sustained only when authorized by law, or when it is free from fraud of any kind. See: E. K. Buck Retail Stores, et al., v. Harket, et al., 157 Neb. 867, 62 NW 2d 288.

In Trefethen v. Amazeen, 93 NH 110, 36 A. 2d 266, is a case in which the agreement between stockholders was for the purpose of securing additional working capital for the corporation. This case is clearly dissimilar to the instant case since Sankin is the only beneficiary.

In Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 29 Del. Ch. 610, 53 A. 2d 441, is a case in which the agreement between stockholders was for the purpose of bringing fresh money into the business. This case is not similar to the instant case, since, again, Sankin is the only one benefiting. This case is similar to the instant case, however, in that the agreement involved was binding and inure to the benefit of the heirs, assigns, etc.

In Tomoser v. Kamphausen, 307 NY 797, 121 NE 2d, in this case the Appellate Division disagreed with the conclusions of the court below that Tomoser was misled by fraudulent misrepresentations of material facts.

In Brownley v. Peyser, et al., 69 App. DC 56, at page 59, 98 F2d 337, is a case in which a plaintiff who seeks equity is not excused for failure to do equity by the fact that a statute of limitations bars affirmative relief to him.

In the case of Larson v. Superior Auto Parts, Inc., 270 Wis. 713, 72 NW 2d 316, this case is dissimilar to the instant case. This is a case in which shareholders signed agreement which bound corporation to buy stock of any severing shareholder.

However, the Court held that the agreement was not enforceable for the reason that the restrictions of the contract were not placed upon plaintiff's stock certificate. This case is dissimilar to the instant case in that Garfield refused and did not consent or ratify with full knowledge of the facts, to restrict the subject stock certificates in conformance with the District of Columbia Code which applies to all restrictions encumbering a stock certificate.

In Simenstad v. Hagen, 22 Wisc. 2d 653, 126 NW 2d 529, this case is dissimilar to instant case in that all of the stockholders agreed to firmly attach to all of the stock certificates a rider containing terms and conditions agreed upon by all stockholders, thereby encumbering the stock certificates. This act of inscribing the stock certificates Garfield refused to do, according to Sankin's testimony.

In Bator v. United Sausage Co., 138 Conn. 18, 81 A2d 442, this case is dissimilar to the instant case in that this case's decisive question is not whether the agreement between plaintiff and another stockholder and director was lawful among themselves, but whether, if it was the corporation that was affected by it. That they had the duty of exercising their best independent judgment in the management of its affairs. The court did not abuse its discretion in deciding that plaintiff had failed to establish his right to the dissolution of the corporation.

In Lawson v. Household Finance Corp., 17 Del. Ch. 343, 152A 723, in the case the court held that one of the primary characteristics of personal property is the right to dispose of it, and this right still exists regardless of the limitations which may

be placed upon it. We agree with the contention that one of the essential incidents to the ownership of property is the right to dispose of it in the manner provided by law. This right has always been zealously guarded by the courts.

This defendant has not been able to find one case that fully supports the plaintiff's contention and the position he has taken in instant case. In fact, the rationale of the cases submitted by Sankin are contra to his position. The foregoing cases submitted by Benn, which include quite a number of the cases submitted by Sankin, are favorable to Benn's position and are dissimilar to the instant case in support of Sankin's contention and position. Very particularly in the case of Doss v. Yingling, upon which Sankin so heavily relies, is also not in Sankin's favor.

III. EVEN IF THIS COURT SHOULD DETERMINE THAT NOTICE IS AN ELEMENT, NO CONVINCING EVIDENCE OF SUCH NOTICE IS PRESENT HERE.

The only evidence of notice which has been presented in this case which would even give any hint of an iota of notice to Benn-5410 Corporation is the thoroughly unreliable testimony of Janet Garfield, who at best could be considered a captive witness. (See counter-statement of the case, supra, bottom page 11.) Furthermore, the contents of the May 1, 1958, agreements of which any purchaser would have had to have notice, if he were to be bound, are open to considerable dispute. (See counter-statement of the case, supra, Garfield testimony, page 4.) This fact is especially striking in view of the later attempts by Sankin and Garfield to buttress, clarify and otherwise amend the May 1, 1958, agreements by entering into the May 26, 1959, agreements. (See

counter-statement of the case, supra, pages 4-5) It must not be overlooked that the May 26, 1959, dealings between Sankin and Garfield occurred after the consummation of the sale to Benn-5410 Corporation, and both had full knowledge and notice thereof.

- IV. IN ANY EVENT, THE ONLY RIGHT WHICH THE MAY 1, 1958, AGREEMENTS GRANTED SANKIN WAS TO PURCHASE THE STOCK FROM 5410-BENN ON THE EXACT TERMS WHICH THEY HAD PURCHASED FROM GARFIELD.

Sankin takes great pains to show that he had a "first right" to buy the stock and, thus, Sankin claims it could not be sold until it had been offered to him or until the expiration of thirty days.

This argument overlooks the clear and uncontroverted fact that the May 1, 1958, agreements were made applicable to the "heirs and assigns" of either party. This would make a "first right" a logical impossibility, an impossibility which Honorable Judge Pine quickly apprehended:

"THE COURT: How could that be possible when the agreement was made applicable to the assigns of either party?"

- V. EVEN IF THIS COURT SHOULD DETERMINE THAT GARFIELD HAD A RIGHT TO DEAL WITH SANKIN FOR SALE OF THE STOCK AFTER THE SALE TO BENN-5410 CORPORATION, NO EFFECTIVE CONTRACT WAS CONCLUDED BETWEEN THEM.

Benn would stress the absurdity of a man selling the same stock to two (2) different purchasers, but if this Court should determine that Garfield could have sold the stock to Sankin after his sale to Benn-5410 Corporation, it is necessary to

determine whether in fact Garfield did sell to Sankin in a legally valid manner, because of the fact that Sankin, by letter of May 15, 1959, made a counter-offer to purchase 16-2/3 shares of stock instead of 66-2/3 shares of stock on terms and conditions as contained in the original offer. Sankin's counter-offer was rejected by Garfield on May 21, 1959.

A qualified or conditional acceptance is a counter-offer and is a rejection of the original offer. The rejection of an offer by the offeree has the effect of terminating it. Moreover, an offer, after it has once been rejected, cannot thereafter be revived by tendering an acceptance thereof.

In Nabob Oil Co. v. Bay State Oil & Gas Co., 225 P2d 513, is a case in which partners sued for an accounting and partition or sale of oil properties owned by the parties. The court sustained a demurrer to plaintiff's petition for specific enforcement of an alleged contract to sell defendant's interest to plaintiff. Plaintiff appealed. The Court held that plaintiff rejected defendant's original offer. The court in its decision adopted the following language, as contained in 12 Am. Jur. Contracts, Sec. 36:

"An offer is terminated by rejection and cannot thereafter be accepted so as to create a contract. A request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it."

"To the same effect is the following holding of this court in Hartzell v. Choctaw Lumber Co., 163 Okl. 240, 22 P. 2d 387:

"In order that an offer and acceptance may result in a binding contract, the acceptance must be absolute, unconditional, and identical with the terms of the offer, and must in every respect meet and correspond with the offer; and any qualification of or departure from those terms invalidates the offer."

In the case of Peerless Casualty Co. v. Housing Authority,

(5 Cir) 228 F 2d 376, the holding of the Appellate Court is as

follows:

"Unless an acceptance is unconditional and without variance from original offer, it is of no legal effect as an acceptance and operates as a rejection and a counteroffer."

In Nicholson v. Erstein, 59 F. Supp. 352, the court held as follows:

"If a condition is affixed to an acceptance by party to whom offer is made, there is a rejection of the offer."

VI. THE EVIDENCE CLEARLY ESTABLISHES A CONSPIRACY BETWEEN SANKIN AND GARFIELD TO DEFRAUD BONA FIDE PURCHASERS AND, THUS, SANKIN SHOULD BE DENIED RELIEF ON THE BASIS OF HIS UNCLEAN HANDS.

The testimony and exhibits offered by Sankin shows that he is "in pari dilecto" with Garfield. It has long been and now is well established that the courts will give no aid whatever to a party from the consequences of his own fraud. The Supreme Court of the United States stated the principle as early as 1885 by adoption of the language of a still older decision as follows: "No court will lend its aid to a man who founds his cause of action upon an (his own) immoral or illegal act." Higgins v. McCrea, 116 U. S. 671, 686.

The law on this point is not in doubt and the authorities are legion. One statement particularly fitting the circumstances of the present case appears in Reynolds v. Boland, 202 Pa. 642, 52 A. 19, as follows:

"From the lips of this complainant, who sues for grace, along with his prayer for a decree that the defendant specifically perform his agreement, there

"comes a confession that its purpose was to deceive, and the ear of the chancellor will not hear the prayer. Into hands soiled by a contract, equity will not place her decree for its enforcement. The doors are closed against one who, in his prior conduct in the very subject matter at issue, has violated good conscience, good faith or fair dealing."

A more recent statement, supported by an extensive review of the authorities, is contained in the opinion in Kansas City Operating Corporation v. Deerwood, 278 F. 2d 354 (CCAS). The opinion in that case quotes from an old authority as still being the law as follows:

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise the cause of action appears to arise ex turpi causa, or the transgression of a positive law of the country, there the court says he has no right to be assisted."

Sankin is without a remedy to increase his 33-1/3% voting rights in the corporations' stock to a 50% voting right in the absence of a provision in the corporations' charters specifically providing therefor. Any other course would be illegal and contrary to public policy. Argument and citation of cases outside this jurisdiction are of no avail. The issue is settled by the provisions of the District of Columbia Code, Section 29-911(a) relating to the voting of shares of corporation stock.

Likewise, no restriction was imposed upon the shares of Garfield & Sankin, Inc., or Julius Sankin, Inc., simply by the execution of the May 1, 1958, shareholders' agreements between Sankin and Garfield. This, too, was a mutual mistake of law. We have inspected the stock certificates and found no restriction on their face which would give any shareholder or his assigns a 30-day option to purchase. Whatever option Sankin thought he had running against the 66-2/3% of the corporations' shares in the hands of

Benn-5410 Corporation was purely gratuitous and was the result of a mistake of law.

The District of Columbia Code, Section 28-2915 provides:

"... there shall be no restriction upon the transfer of shares . . . by virtue of any by-laws of such corporation or otherwise, unless the right of the corporation to such . . . restriction is stated upon the certificate." (Emphasis supplied)

The District of Columbia Code (1961), Section 29-239, provides:

"... all certificates of stock which has no voting power, or is restricted or limited as to its voting power, . . . shall have a statement of such restriction or limitation . . . plainly stated thereon." (Sec. 239)

The manner in which the plaintiff prevented Benn-5410 Corporation from having the 66-2/3% of the shares transferred on those corporations' stock ledgers from Garfield's name to that of 5410 Corporation, shortly after delivery of \$800,000 worth of notes, is contrary to public policy. The Court should require the officers of the two corporations to perform their ministerial act of making the transfer. The so-called "30-day option" running to Sankin was the result of a mistake of law. Since Sankin is relying solely on the provisions of his illegal agreement with Garfield, made May 1, 1958, he is without standing to enforce his non-existent option.

"The law is presumed to be equally within the knowledge of all parties. That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it would be a disastrous doctrine. That a defendant, who by contract could not lawfully relieve himself from liability as a stockholder can accomplish that result by proof that it was fraudulently represented to him so that he could relieve himself, would be strange indeed." Upton v. Tribblecock, 91 U. S. 45, 50.

The rule that a mistake of law does not avail prevails

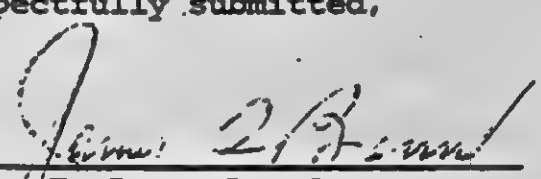
in equity as well as common law. Upton v. Tribblecock, 91 U. S. 45, at page 50; see also, Meacham v. Halley, 103 F. 2d 967, stating fraud cannot be predicated upon misrepresentations of matters of law. "5410" gratuitously led Sankin to believe that his 30-day option was valid. "5410" was wrong. It is contrary to public policy. District of Columbia Code, Sec. 28-2915, 29-239.

The court's attention is respectfully called to the cooperation of plaintiff Sankin and defendant Garfield and the consideration Sankin has received for aiding Nicholson-Garfield by initiating instant case which was instituted as a "friendly suit" at Garfield's request and for the additional gratuity Sankin has received in the form of payment of his legal fees and costs and expenses in this litigation. In United States v. Johnson, 319 US 302, 304, the Supreme Court held that

"Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit by payment of the fees of both. Gardner v. Goodyear Dental Vulcanite Co., 131 US Appendix, ciii."

Conclusion: The evidence clearly establishes a conspiracy between Sankin and Garfield to defraud a bona fide purchaser and, thus, Sankin should be denied relief on the basis of his unclean hands.

Respectfully submitted,


James T. Benn, Pro Se
c/o 605 Southern Building
Washington, D. C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed to counsel of record and pro se party this 5th day of February, 1965, by the undersigned.


James T. Benn, Pro Se

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANKIN,

vs.

5410 CONNECTICUT AVENUE
CORPORATION, ET AL.,

and

BENN,

vs.

GARFIELD, ET AL.

Civil Action No. 1493-59

Civil Action No. 4002-60

OBJECTIONS TO SPECIAL MASTER'S REPORT

Pursuant to Rule 53 (e) (II) of the Federal Rules of Civil Procedure, the defendant James T. Benn makes the following objections to the report of the Special Master filed herein on July 7, 1967:

1. The Special Master's computation of the Stockholders' equity is understated by \$235,387.00. Correction of this error would increase the value of the Stockholders' equity from the \$564,718.00 found by the Special Master to \$800,105.00.

The error is two-fold:

(a) In the computation of the value of other assets than the real property, the Account Payable in the amount of \$162,325.00 denominated in Goldwyn and Berlin's letter of November 27, 1964, as an "amount to complete construction," should not be charged as a liability in the computation of such other assets. (Report p. 23). The record is clear that the F.H.A. commitment was a 90% loan which completely financed the project except for the cost of the land and Senkin's so-called "builder's fee" so that no additional amounts should have been required to complete construction. Since the mortgage amount is deducted in full as a liability (Report p. 22), the \$162,325.00 should not be again deducted as a liability in valuing the other assets. To permit such a double liability, it must be concluded either that Garfield and Senkin, Inc. failed to draw the full amount of the F.H.A. insured mortgage proceeds or that they voluntarily put an additional \$162,325.00 of their money into the project over and above the F.H.A. mortgage and their equity. Neither of these possibilities

agreements were applicable to "EIRS AND ASSIGNS" a peculiar situation to find in connection with a supposedly exclusive right of first refusal; paragraph 3 of said May 1, 1958 agreements contains the following language:

"3. It is further agreed by the undersigned that each stockholder and his "EIRS AND ASSIGNS" will not dispose of any of the shares without first offering same upon 30 days' written notice to the other stockholder or stockholders." (Emphasis added)


5. In determining that this defendant is indebted to defendant Garfield in any amount, it is submitted that the Special Master should have taken into account that this defendant expended \$25,450.00 for the sole use and benefit of 5410 Corporation, as follows:


Arthur Chaite, Esq.	\$ 500.00
Hamel Park & Saunders, Esqs.	4,500.00
Arthur Hilland, Esq.	
(via Benjamin Saunders, Esq.)	9,700.00
Joseph Donahue, Esq.	1,000.00
Arthur Hilland, Esq.	1,250.00
Nicholas Chase, Esq.	1,500.00
Keith Seegmiller, Esq.	7,000.00
	<u>\$25,450.00</u>

This defendant testified to the foregoing before the Special Master and his testimony stands uncontroverted. (M.H. Tr. 1573-1581) In fact, a large part of this offset is substantiated by the docket entries in this case which reflect appearances and legal services rendered by these lawyers for 5410 Corporation.

6. This defendant preserves all of his rights and remedies with respect to the subject matter involved in Civil Action 4002-60 above-captioned.

Respectfully submitted,

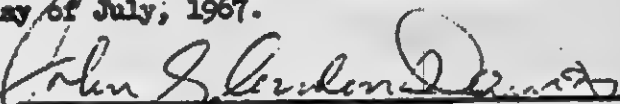

William H. Deck


John Glandon Davies

Attorneys for Defendant Benn, 538 Pennsylvania
Building, Washington, D.C., Telephone: 393-6877

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed to counsel of record, postage prepaid, this 17th day of July, 1967.


John Glandon Davies

*From James T. Benn
Colorado Bldg*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SAMXIN,

PLAINTIFF,

vs.

CIVIL ACTION NO. 1493-59

5410 CONNECTICUT AVENUE
CORPORATION, ET AL.,

DEFENDANTS,

and

JAMES T. BENN,

PLAINTIFF,

vs.

CIVIL ACTION NO. 4002-60

JANET GARFIELD, ET AL.,

DEFENDANTS.

LIST OF NAMES OF WITNESSES

The following list was prepared by Defendant James T. Benn which he intends to use at the time of trial, excepting those witnesses who may be used for rebuttal or impeachment purposes:

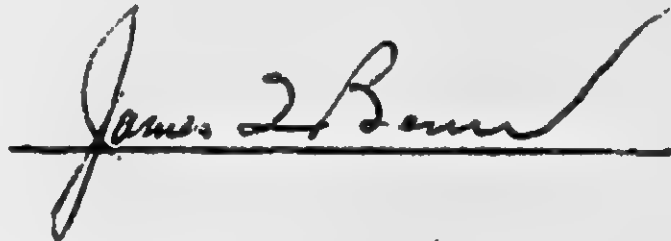
NAME:

ADDRESS:

- | | |
|----------------------------|-----------------------------------------------------|
| 1. Robert M. Baker, Esq. | Santurce, Puerto Rico |
| 2. J. Henry Barbour | c/o William R. Barbour, Bayside,
L. I., New York |
| 3. William R. Barbour | Bayside, L. I., New York |
| 4. N. Paul Berlin | 1411 K Street, N. W.,
Washington, D. C. |
| 5. C. R. Bizwasitre, Esq. | Paramaribo, Surinam |
| 6. Barbara J. Brown | c/o Dayton Co., Miami, Florida |
| 7. Benjamin Brown, Esq. | Colorado Bldg., Washington, D.C. |
| 8. Nathan Brown, Esq. | Colorado Bldg., Washington, D.C. |
| 9. Samuel Brown, Esq. | Colorado Bldg., Washington, D.C. |
| 10. Willie M. Cabell | Notary Public, Paramaribo,
Surinam |
| 11. Arthur M. Chaite, Esq. | Washington, D. C. |

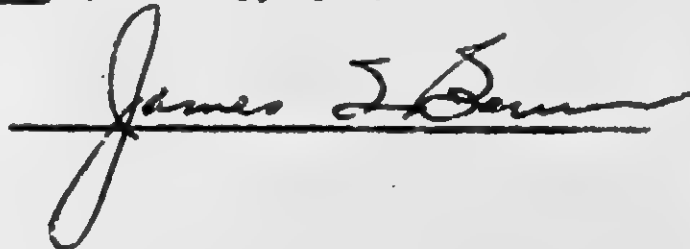
12.	Officer Conner*	Police Dept., Coral Gables, Fla.
13.	Herman O. Corder, CPA	c/o G. P. Graham & Co., Washington, D. C.
14.	Julius Curiel	Paramaribo, Surinam
15.	Elizabeth K. Dayton	c/o Dayton Co., Miami, Fla.
16.	J. Diener Lumber Co.	c/o Robert M. Baker, Esq. Santurce, Puerto Rico
17.	Paul Dobin, Esq.	Cafritz Bldg., Washington, D.C.
18.	Officer Dolan *	Police Dept., Coral Gables, Fla.
19.	Edna S. Downey	Columbus Hotel, Miami, Florida
20.	Detective Edwards **	Police Dept., Coral Gables, Fla.
21.	Dr. Johann F. S. Einaar	Netherland General Consulate, New York City
22.	Robert C. Farquhar **	Coral Gables, Florida
23.	Edward L. Genn, Esq.	Colorado Bldg., Washington, D.C.
24.	S. S. Golden	The Riggs National Bank, Washington, D. C.
25.	Moe Goldwyn	1411 K Street, N. W., Washington, D. C.
26.	J. W. Gonggrijp	Paramaribo, Surinam
27.	Joe W. Harris	Miami, Florida
28.	James A. Hewitt	Washington, D. C.
29.	Mary V. Judge	Notary Public, Washington, D.C.
30.	M. Thomas Kent	Miami, Florida
31.	Dr. W. S. Klawans	Amber Motors Bldg., Atlanta, Ga.
32.	Don E. Kramer	Testum Corp., Columbus, Ohio
33.	Edythe Krantzow	Miami, Florida
34.	Jesse M. McKnight	The Foreign Service, USA
35.	Ellis Miller	National Bank of Washington Washington, D. C.
36.	Edward A. Mitchell, Jr., Esq.	The Riggs National Bank Washington, D. C.
37.	Don R. Nicholson, Esq.	Miami, Florida
38.	Capt. Joseph F. Owens	Miami, Florida
39.	Charles S. Peabbles	C. T. Company, Munsey Building, Washington, D. C.

40. Detective Pitz ** Police Dept., Coral Gables, Fla.
41. Officer Pluto ** Police Dept., Coral Gables, Fla.
42. Lou Poller Miami Beach, Florida
43. William B. Roman, Esq. Miami, Florida
44. Varian B. Sandy c/o Paul Dobin Esq., Cafritz Building, Washington, D. C.
45. Benjamin H. Saunders, Esq. 803 Building, Washington, D. C.
46. Frederick Silver, Esq. New York City, New York
47. Betty K. Smith c/o Paul Dobin, Esq., Cafritz Building, Washington, D. C.
48. Detective Stathers */** Police Dept., Coral Gables, Fla.
49. A. E. Stigler c/o Sanstig Construction Co., 5410 Connecticut Ave., Washington, D. C.
50. Detective Tamerus * Police Dept., Coral Gables, Fla.
51. Robert W. Theed, Esq. Miami, Florida
52. Frank Walker Miami, Florida
53. William H. Piegering The Riggs National Bank, Washington, D. C.
54. Elizabeth B. Williamson Notary Public, Washington, D. C.



CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing List of Names of Witnesses was mailed or delivered to counsel of record in subject civil actions this 31 day of July, 1962.



Miami, Florida,
May 5, 1958

RECEIVED from JAMES T. BENN, c/o Salley & Roman, Attorneys,
Miami, Florida, the sum of Eleven Hundred Dollars, lawful money
of the United States of America, receipt of which said sum is
hereby unconditionally acknowledged as being the full total and
complete amount of money due me from James T. Benn in connection
with and pertaining to the timber and lumber concession in
Surinam and more specifically all of my right, title and interest
in connection therewith has been irrevocably and unconditionally
assigned to James T. Benn this 5 day of May, 1958, for the full
total and complete consideration of the sum above shown, namely
Eleven Hundred Dollars (\$1100.00), for which I have this day
given James T. Benn a general release therefor.

Joe W. Harris
JOE W. HARRIS

Witness:

J. Rebecca Harris
[Signature]

*I, James T. Benn,
do hereby acknowledge
to make receipt of above
sum to J. T. Benn,
my father,
May 5, 1958
James T. Benn*

Sworn to and subscribed before me
this 5 day of May, 1958.

Eva S. Dorney

GEZIEN AAN HET CONSULAAT GENERAAL DER
NEDERLANDEN TE NEW YORK MAY 9 1958

De Consul Generaal
voor de



TO WHOM IT MAY CONCERN:

On Wednesday afternoon, May 13, 1959, a Mrs. Janet Garfield telephoned me unsolicited at my office in New York City, from Miami, Florida. Her conversation with me lasted about an hour. She did most of the talking, and what she related to me was of a highly personal nature. During the course of her lengthy talk, she related to me that on an occasion while Mr. James T. Benn was in her home, she took his brief case which he then had with him, and hid it with the intention of holding it until Mr. Benn would return or deliver certain papers to her and her husband, in connection with an apartment property in Washington, D.C.; that when she opened it thereafter, she found in it some \$120,000.00 in cash, in \$100.00 bills; that after much discussions she returned to Mr. Benn one-half of that cash and retained the rest of it, as well as all of the papers in the brief case, until Mr. Benn would deliver certain stock certificates; and that while she had no intention of keeping this remaining cash, she was holding it until Mr. Benn would carry out whatever they had requested of him in connection with that Washington apartment property, at which time the remaining cash would be returned to him.

Sworn to before me
this 5th day of June,
1959.

Luisa Cowley

TERESA ROWLEY
Notary Public, State of New York
Comm. No. 61-666700
Exp. 12-31-60
New York County Clerk
Term Expires March 28, 1960

Federick Silver

J.A. 245

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN,
Plaintiff,

vs.

5410 CONNECTICUT AVENUE
CORPORATION, ET AL.,

Defendants.

CIVIL ACTION NO. 1493-59

OPPOSITION TO MOTION TO POSTPONE AND
EXTEND THE TRIAL DATE OF THE CASE

This Defendant, James T. Benn, opposes the motion of Plaintiff Julius Sankin to postpone and extend the trial date of this case, and as grounds for his opposition states the following as only a few of the multiplicity of reasons:

- 1.) That this Defendant hereby adopts his reply to Plaintiff Julius Sankin's Motion for Leave to Amend Pre-Trial Order, as filed on March 18, 1963, copy of same is attached hereto.
- 2.) That Plaintiff Sankin has been designed and financed by Cross-Plaintiff Garfield through the use of that certain Indemnity Agreement dated May 20, 1959, to destroy 5410 Connecticut Avenue Corporation which gives rise to conduct causing the breach of contracts between 5410 Connecticut Avenue Corporation and Cross-Plaintiff Joseph A. Garfield. The facts have been developed through more than three years of protracted discovery. (Both Plaintiff Sankin and Cross-Plaintiff Garfield are attorneys and are closely related through marriage.)
- 3.) That Plaintiff Sankin, as of February, 1960, has converted the sum of \$182,166.67 and is violative of the letter and spirit of the Order of the United States Court of Appeals for the District of Columbia. Plaintiff Sankin by this manipulation has

made a profit in excess of \$50,000.00 as owner of 33-1/3% of the capital stock of Garfield & Sankin, Inc. (Corporate owner of the fee simple title)

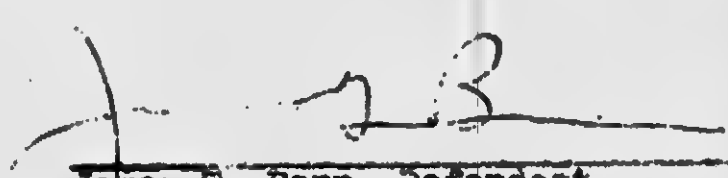
4.) That Plaintiff Sankin, as of August 1, 1959, and thereafter withdrew various sums of monies from Garfield & Sankin, Inc.; namely, \$72,737.43 and \$70,000.00 as set forth in the National Bank of Washington's Certificates of Deposit No. 2553 and No. 2416, and applied same to his use and benefit. Copies of Certificates of Deposits are attached hereto.

5.) That Plaintiff Sankin, as of February, 1960, caused a \$75,000.00 promissory note to come into existence and dated May 1, 1958. This note is a liability of Garfield & Sankin, Inc., as payor, and Plaintiff Sankin and Cross-Plaintiff Garfield are equal owners thereof. As of December 31, 1961, Cross-Plaintiff Garfield has no knowledge of any such note. The said note was not reflected in the corporate Income Tax Returns for the years 1958 and 1959, or reflected in any of the certified financial statements prior to February, 1960.

6.) That the issues in this case are simple and the proof uncomplicated. The issues and proof in this case are not what Plaintiff Sankin and Cross-Plaintiff Garfield would like this Honorable Court to believe. They are hoping that with a touch of thaumaturgy marked by a mumbled incantation of which only the word "fraud" can be made out, and verily their collective design and product of lies, fraud and chicanery is turned and transferred, right before our eyes, unto Defendants 5410 Connecticut Avenue Corporation, Defendant James T. Benn, and the Five Interveners in this case.

WHEREFORE, Defendant Benn prays that the pending Plaintiff Sankin motion be denied for the reasons indicated herein above and that the trial of this non-jury case begin as scheduled on Monday, April 29, 1963, in order that the rightful owners and stockholders be promptly vested with their rights and control of

the incidences thereof. In the event said pending motion is granted, then this Defendant prays that he be permitted to submit factual corrections relative to certain errors of fact (no doubt inadvertently omitted or included) as set forth in Pretrial Examiner's Order.


James T. Benn, Defendant
c/o 505 Southern Building
Washington, D. C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Opposition to Plaintiff's pending motion was mailed or served personally upon the following counsel of record on this 9th day of April, 1963:

John A. Beck, Esq., 505 Southern Building, attorney for Intervenor; Joseph Pardo, Esq., 509 Industrial Bank Building, Miami, Florida, Intervenor appearing pro se; Brown, Genn & Brown, Colorado Building, attorney for Plaintiff; Arthur M. Chaite, Esq., 1523 L Street, N. W., attorney for Garfield & Sankin, Inc., and Julius Sankin, Inc.; Benjamin W. Delaney, Esq., 505 Southern Building, attorney for Cross-Plaintiff Garfield; and, Keith Seegmiller, Esq., 1725 Eye Street, N. W., attorney for Defendant 5410 Connecticut Avenue Corporation.


James T. Benn, Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 25 1964

JULIUS SANKIN,

Plaintiff

v.

5410 CONNECTICUT AVENUE
CORPORATION, et al,

Defendants

and

JAMES T. BENN, et al,

Plaintiffs)

v.

JANET GARFIELD, et al,

Defendants.

FOR LEAVE

-MOTION/TO WITHDRAW AS ATTORNEY FOR
JAMES T. BENN

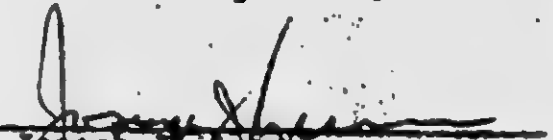
HARRY M. HULL, CLERK

Civil Action No. 1493-59

Civil Action No. 4002-60

Joseph J. Lyman, attorney for defendant (in Civil Action No. 1493-59) and plaintiff (in Civil Action No. 4002-60) James T. Benn moves the Court to allow him to withdraw his appearance for James T. Benn for reasons set out in the attached affidavit.

WHEREFORE, it is prayed that the motion be granted.


Joseph J. Lyman
1200-18th Street, N. W.
Washington, D. C.
Attorney for James T. Benn

CC: James T. Benn, c/o Frost & Towers, Southern Building, 15th & H Streets, N. W., Washington, D. C. and 1201 South Court House Road, Arlington, Virginia, mailed registered mail, this 25th day of September, 1964.


Joseph J. Lyman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 25 1964

JULIUS SANKIN,

Plaintiff

v.

3410 CONNECTICUT AVENUE
CORPORATION, et al,

Defendants

HARRY M. HULL, CLERK

Civil Action No. 1493-59

and

JAMES T. BENN, et al,

Plaintiffs

v.

JANET GARFIELD, et al,

Defendants.

Civil Action No. 4002-60

A F F I D A V I T

DISTRICT OF COLUMBIA SS:

Joseph J. Lyman, attorney for James T. Benn, a defendant and counterclaimant herein, having been duly sworn, deposes and says as follows: That on September 24, 1964, at a pre-trial hearing he was notified for the first time since last October when a mistrial resulted that this case is now set for October 12 or 19, 1964.

Affiant was not consulted concerning it and finds that this date conflicts with firm commitments in other federal courts as follows:

October 19, 1964, jury trial in the United States District Court at Alexandria, Virginia, the date having been set in April 1964 at a pre-trial conference;

November 16, 1964, in the United States District Court at Jacksonville, Florida, a non-jury tax case, the date having been set in June 1964, at a pre-trial conference;

December 13, 1964 in the United States District Court at Miami, Florida, a non-jury tax case, the date having been set in May, 1964 at a pre-trial.

There is also an argument set in the Court of Appeals of Maryland between October 12 and 23, 1964, the exact date to be announced.

In addition, depositions in tax cases have been agreed upon for October and November in three civil tax cases outside the jurisdiction, the exact dates to be fixed shortly.

Furthermore, counsel has not had the cooperation of Mr. Benn with respect to matters which were promised but not fulfilled.

It has been estimated that the retrial will consume 6 to 8 weeks. Based upon the previous proceedings, affiant believes the estimate is conservative. Unless withdrawal is permitted, counsel will suffer irreparable injury to his practice and well-being.


Joseph J. Lyman

Subscribed and sworn to before me this 25th day of September, 1964.


Hazel M. N. Eaton
Notary Public

My Commission Expires Sept. 14, 1965

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANKIN

v.

**5410 CONNECTICUT AVENUE
CORPORATION ET AL**

Civil Action No. 1493-59

GREEN

v.

GARFIELD

Civil Action No. 4002-60

Washington, D. C.

Thursday, October 8, 1964

Before the Honorable WILLIAM B. JONES, United States
District Judge, at 4:03 p.m. today, in chambers.

Appearances:

For plaintiff Julius Sankin:

Mr. EDWARD L. GREEN

**For defendant 5410 Connecticut
Avenue Corporation:**

Mr. KEITH L. SEDGWILLER

Appearances (continued):

For plaintiff and defendant

James T. Bann:

Mr. JOSEPH J. LYMAN

For defendants Joseph A. Garfield

and Janet Garfield:

Mr. BENJAMIN W. DULANEY

For intervenors and defendants

Harry W. Link, Jr.,

Samuel J. Betoff,

Dinty Warrington Whiting,

S. R. Wynn:

Mr. JOHN A. BECK

- - -

-- PROCEEDINGS --

THE COURT. There are two consolidated cases here, Sarkis versus 5410 Connecticut Avenue Corporation et al (Civil Action 1493-59) and Benn versus Garfield (Civil Action 4002-60). I am going to state now what I understand is the stipulation agreeable to all counsel and to Mr. Benn, who will represent himself -- about which I will have more to say shortly:

These consolidated cases came on for trial before the Court without a jury on October 1, 1963. On October 16 the Court declared a mistrial for reasons stated at the time. The cases since then have undergone further pleadings, further pretrial proceedings and pretrial discovery. The cases are now set for trial for October 19, 1964, before me. In an effort to expedite the trial, I have met with counsel and with Mr. Benn concerning the possibility of having as evidence the testimony taken and the exhibits received in evidence in October of 1963. It is my understanding that counsel and Mr. Benn will stipulate to the following:

The testimony of Julius Sarkis and Janet Garfield, as given in October 1963 at the first trial of these cases, may be received as evidence in this second trial; that the exhibits that were then received in evidence will remain in evidence, subject to such objections as were made, both as to the testimony

4

and the exhibits at the first trial; that counsel will be permitted to further examine, cross-examine, and examine on redirect and on recross, bearing in mind that repetition would be most undesirable.

Counsel and Mr. Benn are also agreeable to stipulating that they will consider, between now and October 16, certain exhibits that were not received in evidence when offered at the first trial, with the thought they may be able to agree now as to their admission in evidence.

Gentlemen, have I stated pretty much what you have in mind?

Mr. Genn?

MR. GENN. Yes, I believe so, Your Honor, with one other point. Your Honor has stated "counsel and Mr. Benn." There is another pro se defendant, Mr. Pardo. And while he is also an attorney, I think the record should reflect what his position is with reference to this at this time, so we have a complete record.

THE COURT. What I will do, after getting the consensus of views present, I will then read into the record Mr. Pardo's October 6 letter to me. But as I have stated it, assuming all others are agreeable, you will adopt that as your stipulation?

MR. SHIM. That is correct.

THE COURT. Mr. Dulany?

MR. DULANY. Yes, Your Honor.

THE COURT. Mr. Seegmiller?

MR. SEEGMILLER. Yes, Your Honor.

THE COURT. Mr. Beck?

MR. BECK. Yes, Your Honor.

THE COURT. Mr. Bean?

MR. BEAN. Yes, Your Honor.

THE COURT. I have before me a letter from Mr. Pardo, addressed to me and with copy to all counsel, dated October 6, 1964. Rather than reading it, I will give it to the reporter and he may copy it right into the record. So that with that all parties, as represented, and Mr. Bean representing himself, have stipulated and agreed as above stated.

(The letter from Mr. Pardo is as follows:)

Law Offices

JOSEPH PARDO

509 City National Bank Building

25 West Flagler Street

Miami, Florida 33130

Franklin 7-2311

(Letter from Mr. Pardo, continuing:)

October 6, 1964

HONORABLE WILLIAM E. JONES

United States District Judge

U. S. Courthouse

Washington 1, D. C.

Re: Sankin v. 5410 Connecticut Avenue Corp., et al.
Civil No. 1493-59

Dear Judge Jones:

Please be advised that I received a letter from Mr. Edward L. Gern, attorney for Mr. Sankin, advising me that it is your desire that all counsel be present in your chambers on October 8th at 3:00 P. M. in order to discuss the issue of Mr. Gern and his counsel.

I have also been advised that you would desire some agreement of counsel regarding testimony already presented before your Honor, providing that Mr. Beck and I would be permitted cross examination in connection with the additional issues presented by the additional pleadings subsequent to the mistrial. I respectfully advise this Court that I have no objection to the Court's considering the testimony already presented before your Honor without the necessity of duplicating said testimony under the conditions set forth by your

(Letter from Mr. Pardo, continuing)

Honor that Mr. Beck and I would be permitted full cross examination on the additional issues presented. Also, it is my desire that this matter not be continued or delayed, if at all possible.

The reason that I am not able to personally be present is that I have various court commitments for clients here in Miami before the Circuit Court; otherwise, I would be personally present. I sincerely hope the Court will understand why I am not able to appear personally before the Court as requested.

Respectfully yours,

(Signed) Joseph Pardo

JP:sk

JOSEPH PARDO

cc: All Counsel

- - - -

THE COURT. One additional thing, and that is Mr. Benn's representation of himself. He was represented by Mr. Joseph Lyman in these actions, Mr. Lyman representing him at the time of the first trial. Mr. Lyman has moved the Court to permit him to withdraw as attorney for Mr. Benn, stating as the basis for such motion that he has a number of professional engagements in other districts concerning other cases that have been set for trial before the setting of this

second trial in these cases. Mr. Benn, the client of Mr. Lyman and a party to each of these actions, has consented. The Court has advised Mr. Benn he should be represented by counsel and, if he did not consent to Mr. Lyman's withdrawing as his attorney, the Court would compel Mr. Lyman to remain and serve as counsel; but that if he is going to continue to consent to Mr. Lyman's withdrawing, he should get other counsel if possible.

Mr. Benn has stated to the Court that at this time he is of a mind to represent himself. The Court has stated to Mr. Benn that he will be held to the same rules and the same standards as counsel in this case, and that he must bear that in mind in conducting his own case, and in any examination or cross-examination of witnesses.

You understand that, Mr. Benn?

MR. BENN. Thank you, Your Honor; I do.

THE COURT. Thank you, gentlemen. Is there anything further?

MR. LYMAN. If the Court please, there is one thing, if I can get counsel to agree.

THE COURT. I might say at this time Mr. Joseph Lyman is still representing Mr. Benn, and that he will be permitted, in view of Mr. Benn's consent, to withdraw as counsel immediately at the termination of this proceeding

today.

MR. LYMAN. Thank you.

THE COURT. All right, Mr. Lyman.

MR. LYMAN. We want to amend our response, we want to amend our pretrial statement of the defendant Benn to the counterclaim, which was cross-claim actually, of defendants Betoff, Link, Whiting and Winn.

THE COURT. That is the answer of defendant Benn to cross-claim of defendants Betoff, Whiting, Link and Winn, yes, sir.

MR. LYMAN. And I have specific reference to the pretrial statement which I filed, oh, the 15th of September.

THE COURT. The pretrial statement is not particularly important, unless there is something you wish to say.

MR. LYMAN. We want the last and I think the final supplement to the pretrial order amended to read that the defendant Benn invokes the statute of limitations against the claims of plaintiff and defendants as counter-claimants with regard to any claims growing out of the transactions surrounding the May 26, 1959 documents filed or to be filed by the plaintiff in this case as exhibits.

THE COURT. In other words, what you desire to do is assert now as an additional defense, both as against the

plaintiff Sartin and the defendant-intervenor -- counter-claimants to you, or cross-claimants, I guess -- Detoff, Link, Whiting and Winn.

MR. LEMAN. That is right -- and Pardo as well.

THE COURT. And Pardo.

The first person affected is Mr. Gann. Are you going to object?

MR. GANN. I don't see the basis of it, because this claim was filed against this defendant earlier. But I won't object to it.

MR. BECK. I have no objection.

THE COURT. And you have no objection.

MR. BECK. But I can't speak for Pardo.

THE COURT. So far as the plaintiff Julius Sartin is concerned, --

MR. GANN. I thought actually, Your Honor, this was directed to the cross-claim, --

THE COURT. I did, too.

MR. GANN. -- of the intervenors.

MR. LEMAN. We want to extend it, if we can.

MR. GANN. I have no objection.

THE COURT. As far as the plaintiff Julius Sartin is concerned, and the defendant-intervenor and cross-claimants Detoff, Whiting, Link and Winn are concerned, there

will be no objection. The Court will permit the defendant Benn, in Civil Action 1493-59, to assert a defense of statute of limitations.

So far as intervenor-defendant-crossclaimant Pardo -- is he a cross-claimant, too?

MR. LYMAN. I don't think he did, actually.

MR. BECK. Does the next page of the pretrial statement indicate he did?

MR. LYMAN. Well, if he did.

MR. BECK. That is, page 11.

THE COURT. It says, cross-claim, he denies the statement of the cross-claim of other intervenor-defendants against the defendant Benn.

MR. LYMAN. I guess that does it, yes.

THE COURT. And as far as intervenor-defendant Pardo, cross-claimant Pardo, is concerned, no such defense of statute of limitations may be asserted, unless either there is service by motion or stipulation can be obtained from Pardo. And I ask now that Mr. Lyman prepare an amendment to the answer to the amended complaint on behalf of the defendant Benn, asserting the statute of limitations, and an amendment to defendant Benn's answer to the cross-claim of intervenor-defendant-crossclaimants Betooff, Link, Whiting and Winn. So file that, and the pretrial order will so stand

amended.

And it is up to you to work out this other thing with Parde. You will either have to file your motion, and follow it on for hearing, --

MR. LYNAN. Very well, Your Honor.

THE COURT. Very well. We will leave it at that. I think you will maybe want to give consideration to being here for the argument of that motion.

MR. LYNAN. Yes, sir.

THE COURT. I am going to file this withdrawal.

MR. LYNAN. I will be available.

THE COURT. But what you had better do is, if you come in on that motion, you had better file an appearance for the purpose of the motion.

MR. LYNAN. Your Honor, I have one more thing I want to ask counsel when they are here. The joining of these two cases I think was ill-advised, for appeal purposes. Take the case of Civil Action 4002-60, involving the incident of the \$60,000 and the briefcase. That really is something between Mrs. Garfield and Dunn.

MR. DULAK. And Mr. Garfield. He is named as a party, too.

MR. LYNAN. But let us assume that portion of the case is to be appealed, by either party. You will have a

transcript that will cost a fortune.

THE COURT. You wouldn't take all the transcript up, but would just dig out what you want.

MR. HANAN. All right, sir.

THE COURT. I am not going to tear these things apart. I will not unconsolidate the cases.

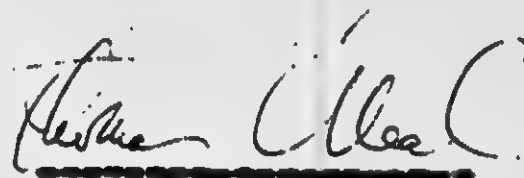
All right, gentlemen; thank you for coming down. I will see you on the 19th.

(Accordingly at 4:25 p.m. the instant proceeding was concluded.)

- - -

REPORTER'S CERTIFICATE

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.



- - -

THE COURT. Now, Mr. Reporter, will you please read the stipulation.

STIPULATION

THE REPORTER (reading:)

The Court: These consolidated cases came on for trial before the Court without a jury on October 1, 1963. On October 16 the Court declared a mistrial for reasons stated at the time. The cases since then have undergone further pleadings, further pretrial proceedings and pretrial discovery. The cases are now set for trial for October 19, 1964, before me. In an effort to expedite the trial, I have met with counsel and with Mr. Benn concerning the possibility of having as evidence the testimony taken and the exhibits received in evidence in October of 1963. It is my understanding that counsel and Mr. Benn

will stipulate to the following:

"The testimony of Julius Sarkin and Janet Garfield, as given in October 1963 at the first trial of these cases, may be received as evidence in this second trial; that the exhibits that were then received in evidence will remain in evidence, subject to such objections as were made, both as to the testimony and the exhibits at the first trial; that counsel will be permitted to further examine, cross-examine, and examine on redirect and on recross, bearing in mind that repetition would be most undesirable. Counsel and Mr. Benn are also agreeable to stipulating that they will consider, between now and October 16, certain exhibits that were not received in evidence when offered at the first trial, with the thought they may be able to agree now as to their admission in evidence."

THE COURT. And at that time counsel then expressed agreement on that, and I gave to the reporter at that time, Mr. Pardo, your letter to me and that was treated by all concerned as your agreement to this stipulation -- and you do agree, do you not?

MR. PARDO. Yes, Your Honor.

THE COURT. Very well.

J O I N T . A P P E N D I X

(Vol. II, J.A. 268-End)

II

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO

Appellants

v.

JULIUS SANKIN

Appellee United States Court of Appeals
for the District of Columbia Circuit

United States Court of Appeals
District

No. 21957

FILED JAN 14 1969

FILED DEC 27 1968

JAMES T. BENN

Appellant

Nathan J. Paulson
CLERK

v.

JOSEPH A. GARFIELD, et al.
Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EDWARD L. GENN
610 Colorado Bldg.
Washington, D. C. 20005
Attorney for Appellee Sankin

JOHN GLANDON DAVIES
538 Pennsylvania Building
Washington, D. C. 20004
Attorney for Appellant Benn

BENJAMIN DULANY, ESQ.
822 Southern Bldg.
Washington, D. C. 20005
Attorney for Appellee
Joseph Garfield in No. 21957

BERNARD S. COHEN
110 North Royal Street
Alexandria, Virginia
Attorney for Appellant 5410
Connecticut Avenue Corporation

JOSEPH PARDO
609 City National Bank Building
Miami, Florida 33130
Appellant, pro se

VOLUME II

INDEX OF TRANSCRIPT TESTIMONY AND CROSS REFERENCES TO JOINT APPENDIX

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JOSEPH GARFIELD	4076-4077 4079-4080 5111-5131 5192-5244	284-285 285-286 287-303 303-338
JANET GARFIELD	758-781 786-787 798 880-885B	339-352 353 354 354-360
JAMES BENN	4929-4938 4562-4568 5011-5018 5295	361-368 368-373 374-381 381
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ATTORNEY ARTHUR PHELAN	1812-1825	400-411
ATTORNEY DON NICHOLSON	1859-1874 2044 2072	412-424 424 425
ATTORNEY PAUL DOBIN	1442-1444 1478-1479	426-427 428-429

UNDISPUTED FACTS

(Tr. 1806 - 1811)

Garfield and Sankin, Inc., a corporation, was the owner of a large apartment project being constructed at 5410 Connecticut Ave., N.W. in the District of Columbia.

Said building was constructed by Julius Sankin, Inc., a corporation, for Garfield and Sankin, Inc.

P Sankin and D Garfield were the sole stockholders in Garfield and Sankin, Inc. and Julius Sankin, Inc. P Sankin held 33 1/3 shares of said stock in each of said corporations, and D Garfield held the remaining 66-2/3 shares of said stock.

P Sankin and D Garfield signed two agreements bearing date of May 1, 1958^{*} (P's Exhibits A and B attached to complaint), providing, among other things, (1) that notwithstanding the amount and percentage of stock held by each of them, each should have equal voting rights in the corporations, (2) that any dispute should be resolved by arbitration, and (3) that each stockholder, his heirs, and assigns would "not dispose of any of the shares without first offering same upon 30 days written notice to the other stockholder or stockholders."

D Garfield, as seller, and D Benn, executed a paper writing bearing the date of March 14, 1959, entitled "Stock Purchase Agreement", providing for sale by D Garfield of Garfield's 66-2/3 per cent of the authorized, issued and outstanding capital shares of the common voting stock of Garfield and Sankin, Inc., for the purchase price of \$600,000.00, payable by one demand promissory note, non-negotiable, in the face amount of \$540,000, payable on or before Dec. 1, 1959, said notes to be made and executed by the corporation

* Only P Sankin and D Garfield stipulate that said two agreements were signed on May 1, 1958.

to be formed to take title to said stock. Said agreement provided further that the purchase price was made subject to P "Sankin's option to purchase said 66-2/3 shares of stock upon the same terms and conditions as the purchaser named" therein, and that the agreement was made by D Benn "acting for and on behalf of other parties in interest," and that the corporation to be formed should take over by assignment of Benn's rights in the contract. (See copy attached to answer of Garfield, as Exhibit 1).

A similar agreement bearing date of April 21, 1959, was executed by Garfield and Benn, for sale to Benn, of Garfield's 66-2/3 shares of common-voting capital stock in Julius Sankin, Inc., for the purchase price of \$200,000, to be in the form of a promissory note payable on demand, non-negotiable and executed by the corporation to be formed to take title to the stock. (See copy attached to D Garfield's answer as Exhibit No. 2.)

On April 8, 1959, as evidenced by the receipt of Riggs Bank, copy of which is attached to the answer of D 5410 Conn. Ave. Corp. as Exhibit I, there was deposited at Riggs National Bank, escrow agent, a demand note payable to Joseph A. Garfield in the amount of \$60,000, dated April 8, 1959, and a note dated April 8, 1959 in the amount of \$540,000, payable to Garfield, on or before Dec. 1, 1959, both signed by 5410 Connecticut Avenue Corporation by James T. Benn, President Pro-Tem.

On the same date D Garfield deposited with Riggs Bank a stock power dated April 8, 1959, assigning to 5410 Conn. Ave. Corp. its 66-2/3 shares of stock in Garfield and Sankin, Inc. (Exhibit E attached to complaint.)

On April 10, 1959, D 5410 Conn. Ave. Corp. was incorporated under the laws of the District of Columbia.

On or about April 14, 1959, D Garfield deposited with Riggs National Bank stock certificate for his 66-2/3 shares in Garfield and Sankin, Inc.

On April 21, 1959 there was deposited with Riggs National Bank a demand note dated April 21, 1959 payable to Joseph A. Garfield in the amount of \$200,000, signed by 5410 Conn. Ave. Corp. by James T. Benn, President Pro-Tem.

On April 21, 1959 Joseph A. Garfield deposited with Riggs National Bank an executed stock power covering 66 2/3 shares of common voting stock of Julius Sankin, Inc. to be held in connection with the escrow agreement between said Garfield and 5410 Conn. Ave. Corp.

By letters dated April 21, 1959 (Exhibit C and D attached to complaint), D Garfield informed P Sankin that he had sold and assigned his 66-2/3 shares of stock in Garfield & Sankin, Inc., and in Julius Sankin, Inc., to D 5410 Conn. Ave. Corporation, for the total selling price of \$800,000, payable on or before December 1, 1959, subject to P's 30-day "option to purchase," and stated that the letters were intended to give P notice pursuant to P's "option."

On May 1, 1959 Riggs National Bank acknowledged receipt from Joseph A. Garfield of certificate No. 1 representing 66-2/3 shares of common stock of Julius Sankin, Inc. registered in the name of Joseph A. Garfield, for deposit in connection with the escrow agreement between Joseph A. Garfield and 5410 Conn. Ave. Corp.

Purportedly under date of May 4, 1959, the following documents were executed:

1. Letter of authorization from 5410 Conn. Ave. Corp. by D Benn to Riggs National Bank.
2. Joint letter of authorization from D Garfield and 5410 Conn. Ave. Corp., by D Benn, to Riggs National Bank.
3. Exchange agreement between 5410 Conn. Ave. Corp., acting through D Benn, and D Garfield.

4. Irrevocable assignment by Garfield to 5410 Conn. Ave. Corp.
5. Stock power to D Garfield, signed by James T. Benn, for 2,000 shares of bearer voting stock in International Timber Corp.
6. Receipt signed by D Garfield for 2,000 shares of bearer voting stock in International Timber Corp.

By letter dated May 15, 1959 (Exhibit F to complaint) P Sankin notified D Garfield that he thereby exercised his "options" to acquire 16-2/3 of the shares owned by Garfield in Garfield and Sankin, Inc. and 16-2/3 shares owned by Garfield in Julius Sankin, Inc., upon terms and conditions set forth in said letter.

Under date of May 21, 1959, P Sankin and D Joseph A. Garfield signed the following documents

Agreement of stockholders

Voting trust agreement

Indemnification agreement

Pledge agreement

Two mutual general releases

Notes totalling \$800,000 for the purchase of

Garfield stock by Sankin

Copies thereof are attached to the second deposition of P Sankin herein.

At some time intervenors Link, Betoff, Pardo, Whiting and Winn signed an agreement purportedly bearing date of May 26, 1959, for the purchase of 250 shares of stock in 5410 Conn. Ave. Corp. from James T. Benn as seller.

* * * *

PORTIONS OF MR. SANKIN'S TESTIMONY

(Tr. 608)

(MR. SANKIN) THE WITNESS: As a matter of fact, it is my feeling that my right of purchase originated with regard to these corporations in the stockholders agreement of May 1st, 1958.

BY MR. BECK:

Q They originated in the May 1, '58, agreement?

A My rights to purchase are derived from this stockholders agreement. As far as I was concerned, in my agreement with Garfield with regard to the stock of these corporations, I would have a right to buy it at a reasonable price or a bona fide price and that he would have the same right, and that neither one of us could dispose of this stock without first offering it to the other person on 30 days' notice.

* * *

* * * *

MR. BECK:

(Tr. 622) Q Those are Plaintiff's Exhibits No. 2 and 3, which I hand you?

A That is correct.

Q Will you point out the provisions of Plaintiff's Exhibits No. 2 and 3 on which you based your right, or claimed right, to purchase 16-2/3 shares of the stocks of these corporations.

A In paragraph 3 it says, "will not dispose of any of the shares of stock without first offering same upon 30 days' written notice to the other stockholder." And I was attempting to purchase some of the stock in order to equalize my position.

Q And that is the sole basis for your right to purchase 16-2/3 shares of stock?

A Well, I am not sure that I understand you, again.

Q Well do you have any other basis for believing that you had a right to purchase 16-2/3 shares of stock?

A At the time this May 1st, 1958 agreement was entered into, there were discussions with Mr. Garfield and myself. We stated very clearly to each other that this was essentially a partnership arrangement; this (Tr. 623) right of purchase was a personal one, so that neither of us could be foisted with an unwanted partner or associate; that in order to avoid this possibility the other partner would always have a right to purchase first the other person's shares of stock at a reasonable or bona fide price.

And it was in an effort to maintain my equal voting position that I made the offer to purchase 16-2/3 shares of stock, so that I would not be in a position where certain things that were threatened of me could take place.

Q Does that complete your answer?

A I think so.

Q I ask you to look at Plaintiff's Exhibits No. 2 and 3 and point out the provisions, if you will, sir, on which you based your right to purchase these stocks at, I believe you said, book value?

A Well, I said a reasonable market value, or book value, or at a price which an arbitrator would determine.

Q Will you point out the provisions of those agreements on which you base that?

A Paragraph 2 refers specifically in case of any disagreement the matter is to be resolved by arbitration.

(Tr. 624) With regard to the paragraph 3, which specifically gives you the right of first purchase, it was clearly the understanding between Mr. Garfield and myself that the price would be a reasonable price and a bona fide price. And we were not talking or even contemplating, at the time this agreement was entered into, any fraudulent prices.

* * * *

(Tr. 235) Q All right, sir. Will you please tell us what occurred?

A Without any preliminaries, Mr. Garfield announced to me that he had sold to Benn all his interest in both of our corporations and he had no further interests in either of the corporations and that he would not be doing business with regard to these corporations and that in the future I would have to do business with Mr. Benn.

MR. LYMAN: If the Court please, would you fix that date?

THE WITNESS: April 21st, 1959.

BY MR. GENN:

Q What was your response? Tell us, if you will, in narrative form the substance of what occurred and what each party stated to the other at this event on April 21st.

A My immediate response was to tell Joe, "Joe, you can't do something of this type. We have a contract to the effect that you must first offer this stock to me." Mr. Benn immediately interrupted and said, "He has already sold it to me. Don't you understand English? I have bought control of these corporations, and I intend to exercise control." I turned to Mr. Benn and I said, "Mr. Benn, I don't know whether or not you (Tr. 236) have; but if you have, I just want to tell you that I have an equal voting arrangement with Mr. Garfield; it is in writing; and if, in fact, you have purchased this stock, it is subject to my equal voting rights.

An argument started to ensue. Voices were raised. I said there is no point to continuing this discussion, let me see if I can get our attorney on the phone. I picked up the phone; and, fortunately, Mr. Chaite was in his office. Mr. Chaite was on one end, Mr. Garfield on one extension, I on the second extension, Mr. Benn on the third extension. A rehash of this took place, and we decided that there was no point in continuing this conversation in the office in the presence of some other people who were there; and we all went down to Mr. Chaite's office.

Q Now, for the record, Mr. Chaite is Mr. Arthur Chaite, who was formerly a defendant in this case and is attorney for the two corporations, is that correct, sir?

A That is correct.

* * * *

(Tr. 240)

BY MR. GENN:

Q Now, sir, when was the next contact with one of the parties or group of parties in this case?

A On the 24th of April, the following day.

Q What happened then?

A I had a very nasty procedural problem.

Q Well, Mr. Sankin, let me interrupt you a moment. Who was present at this particular meeting that you are referring to?

A On the 24th?

Q Yes.

A Myself, Mr. Chaite, Mr. Benn, and Mr. Saunders.

Q Will you tell what transpired?

A The building was still under construction. It was getting towards its terminal stages. I had dozens and dozens of bills that had to be paid.

MR. SEEGMILLER: I object. This is not responsive to the question. What transpired was the question.

THE COURT: Go ahead and just tell us what transpired.

(Tr.241) THE WITNESS: I made arrangements with Mr. Benn that he would be put in Mr. Garfield's position with regard to co-signing checks of the corporation and that he would be substituted for Mr. Garfield as a director and officer of the corporation. I made it very clear that this was being done solely for the purpose of continuing the business of the corporation, that I had nothing to hide and that I had no objection to him signing checks with me, but I also made very clear that this was done for that reason alone and that I was not recognizing the sale or recognizing him or recognizing his position.

There was a basic cleavage that was discussed several times, namely, Would Mr. Benn recognize my equal voting position? And Mr. Benn's answer, no, he bought control, he was going to exercise control, and that if I started fooling around, that he would put this corporation into receivership; and he knew that the appointment of a receiver--

MR. LYMAN: I object to this.

THE COURT: I sustain it.

MR. GINN: If the Court please, I think he is stating--

THE WITNESS: This is what Mr. Benn told me.

THE COURT: I said, that is what he can say, not what he knew.

(Tr.242) THE WITNESS: Mr. Benn told me that he could put it into receivership and that Mr. Benn knew that if a receiver was appointed this would be a violation of the terms of our mortgage commitment and that the commitment could be recalled or rescinded; and that he, Mr. Benn, also told me that money was not important to him, that he had enough to take care of this building, and he didn't need any mortgage. So I just better behave myself.

Also at that meeting we signed some checks. I withdrew \$20,000 in the form of two checks, one for 12 and one for 8; and a check was given to Mr. Chaite for legal services; and a check was made out to Mr. Benn in the amount -- not to Mr. Benn -- to 5410 Connecticut Avenue Corporation in the amount of \$24,000. This was necessary and agreed to because Mr. Benn said unless he received this money he would not agree to co-sign checks and permit this business to continue.

* * * *

(Tr.258)

BY MR. GENN:

Q All right, sir. When was the next contact? Now, this letter was dated May 15th, 1959. We are at that point.

A Well, I have just testified that I sent that to Mr. Garfield, and I sent out copies with the covering letter to the other parties, 5410, specifically.

Q All right, sir.

A That evening I received a phone call from the building stating that two gentlemen were there looking for me. I picked up my neighbor and attorney who I had retained two days before, a gentleman by the name of Paul Dobin--

Q Spell that, sir.

(Tr.259) A D-o-b-i-n -- and was at the Garfield Apartments within ten minutes. When I arrived there, I found Mr. Benn in the lobby and with him was a gentlemen who we later found to be Dinty Whitting, one of the defendants or intervenors in this action.

Q What transpired at that meeting, sir?

A This meeting took several hours. Mr. Benn told me that he knew that he overpaid when he purchased these stock interests for \$800,000, and he said the reason he did it was that he was making use of tax-free money from out of the country and that as far as he, Benn, was concerned, it was a very advantageous deal. He reiterated to me that there is no question but that he was an innocent purchaser for value and stated unequivocally that I should not fool around with him. He further stated that if I was afraid of him, as I indicated that I was, because of his persistent refusal to honor my equal voting arrangement, that he would be very happy to sell out to me. I replied that it was all very well and good, but that the price he had paid was ridiculous and I wouldn't consider it.

(Tr.260) He said again that I didn't fully appreciate the tax-free foreign dollars that he was using, and he offered to sell me what he had just purchased from Garfield, all the stock interests, for the sum of \$480,000. I told him that in my opinion even this amount was excessive and if he is talking in terms of that type of money I would be glad to sell to him. He immediately offered me \$250,000 for my interests in the corporations; and I accepted. I told him I would be very happy to sell at that particular price. He wanted me to accept certain terms. I told him that I was not inclined to offer him any terms, that if he was interested in buying, that I was very happy to sell to him, that I would do so, and that I would undertake the responsibility of finishing the building in accordance with my contract.

Up until this time, Mr. Whiting had been very, very quiet, but at this particular time of the conversation he was introduced as an associate of Mr. Benn and also as Mr. Benn's attorney. And Mr. Benn told Mr. Dobin and myself that he, Benn, is a very busy man, he has to go out of the country on a moment's notice, and that if I would agree to accept \$250,000, Mr. Whiting would dictate to Mr. Benn the type of contract that should be entered into and we would consummate the deal.

(Tr.261) Prior to that, Mr. Benn asked if I would give him an irrevocable offer to sell at the \$250,000 price. I told him that I was not inclined to make any irrevocable offers of any type, that if he wished to consummate a deal it would be done and that I would agree to accept \$125,000 cash, the other \$125,000 to be put in escrow subject only to the conditions subsequent of the completion of the building.

This was agreed to. Mr. Whiting spent a considerable amount of time with Mr. Dobin reviewing papers that Mr. Dobin could prepare the following day. Mr. Benn and I continued our conversation. He told me again

that I should be very careful how I deal with him, that he knows the price was excessive, but that if I think there is anything wrong with the deal, I should bring an action for a declaratory judgment. He waived a copy of the NIL under my nose and said, "Now, there is no question about it. If there is any doubt about it, you lost your rights by not indorsing the stockholders agreement on the stock and the failure to do that makes me an innocent purchaser for value."

This took three to four hours and, finally, the meeting broke up with the understanding that Mr. Benn was going to be leaving town and that Mr. Whiting, his attorney and associate, would arrange to close the deal with my attorney, Mr. Dobin, and that I had agreed and would agree to sell out for the sum of \$250,000.

Q Your attorney at that time was Mr. Dobin?

A Mr. Dobin, yes, sir.

* * * *

(Tr. 634)

BY MR. BECK:

Q Yesterday I believe you testified that on May 15th you had met with Mr. Benn and he had offered to sell out to you for \$480,000.

A \$480,000, all that he had purchased from Mr. Garfield for \$800,000.

Q Or he offered to purchase from you for \$250,000?

A Or he offered to purchase from me for \$250,000, and I agreed forthwith to sell.

Q And at that time he advised you that the notes of 5410 had been cancelled, and 5410's purchase had been completed?

A Well, he didn't put it just in that fashion.

Q Mr. Sankin, between May 15th and your meeting on the morning of May 26th, did you contact Mr. Benn or Mr. Saunders or anyone in connection with 5410 concerning your exercise of your purchase rights?

A I sent a letter to 5410 on the 15th of May, which enclosed a copy of my letter of the 15th to Mr. Garfield, and advised 5410 that I had exercised the option, and further advised them with regard to my rights under the May 1st, 1958 agreement, specifically my equal voting rights.

(Tr.278)

* * * *

BY MR. GENN:

Q Tell us what transpired?

A Whiting called and said he was not able to keep his appointment, that he was not able to get in touch with Benn, and that he cannot complete the agreement that we had reached wherein I was going to sell to Mr. Benn my interest in these corporations for the sum of \$250,000. Whereupon, I saw that this sale was not going through, and I instructed my attorney to call Mr. Nicholson and arrange for an appointment to see what we could do with them.

* * * *

(Tr.681)

(MR. SANKIN).....

A discussion ensued. During that discussion the point was made by Mr. Garfield, look, I have already bound myself. You have my agreement. You have my agreement that this stock cannot be sold unless

a bona fide price or a reasonable value was offered for this. I cannot sell before that. There is no further effect by putting this on the stock certificates. He didn't want his wife to do it. The contracts were binding. Mr. Chaite said yes, the contracts were binding and although it was common practice to put it on the stock certificates, in view of Mr. Garfield's very firm request that it not be done, the point was not insisted upon.

Q You relied on --

THE COURT: You said he didn't want his wife to know about it?

THE WITNESS: That is exactly what I said.

BY MR. PARDO:

Q You relied --

A The basis of the objection, he did not want his wife to know about the restriction.

Q You were satisfied with that explanation?

A Yes, I had no reason to doubt the truthfulness at that time.

* * * *

EXTRACT OF MR. BENN'S CROSS EXAMINATION OF MR. SANKIN

* * *

(Tr. 4681) Q Addressing ourselves to the date of May 15, 1959, please sir:
Do you recall how many of the May 4, 1959 documents that I showed you
at that time?

A No.

Q Did you see the cancelled notes?

A My recollection, Mr. Benn, is that you exhibited to me a
photostat of the cancelled notes and told me that this is a completed
transaction under the D. C. Corporation Code and the Negotiable
Instruments Law; that while I might have had a chance on an executory
contract, on an executed contract, I'm through and I had better not play
rough with you.

Q What other May 4, 1959 instruments did you see on May 15, 1959,
Mr. Sankin?

A I don't recall the specific instruments, Mr. Benn, but the
main thrust of your showing me these things was to show that the notes
had been cancelled and has been executed. Whether you showed me the
instruction from Mr. Garfield at that time in connection with those
notes, it's hard to say because I have since seen these instruments.
One thing I do remember is a photostat of the cancelled notes.

* * *

PORTIONS OF MR. GARFIELD'S TESTIMONY

(Tr. 4076)

BY MR. BECK:

Q Is that the first time that you had discussed your dissatisfaction with Mr. Sankin with Mrs. Garfield?

A Yes.

Q Had you discussed your dissatisfaction with Mr. Sankin with anyone else prior to that time?

A I probably stewed about it inside; but I don't think that I discussed it with anyone else.

Q You don't recall discussing it with Mr. Mankes prior to that time?

A No, I don't think I did.

Q You did have some discussions with Mr. Sankin prior to that time, wherein you expressed some dissatisfaction, didn't you?

A Well, he knew I was very unhappy with him.

Q Why were you unhappy with Mr. Sankin's activities or your arrangement with Mr. Sankin?

MR. GENN. I am going to object to that.

THE COURT. Sustained.

BY MR. BECK:

Q What had come to your attention which gave you reason to be dissatisfied with Mr. Sankin's activities or your relationship with him?

MR. GENN. I object if it came from anyone other

(Tr. 4077) than Mr. Sankin in conversations on something of this nature.

conversations between Mr. Sankin and Mr. Garfield. If it includes any other matters, then I would object.

THE COURT. Did you express to your wife your basis for your dissatisfaction with Sankin on that trip?

THE WITNESS. Yes.

THE COURT: All right, state what you told her.

THE WITNESS. I indicated to her that Mr. Sankin just seemed to want to deplete the treasury of funds, and that he has had his hand in the till; that other things had developed that caused me to become further suspicious; and that I felt that I needed my control in order to protect myself. By "control," I mean my voting rights, which could be coincident with my stock ownership.

* * * * *

(Tr. 4079)

Q At the time of signing or leading up to preparing those agreements, did you have any discussions concerning them?

A Yes, we did.

Q Did you have any discussions as to whether the disproportionate voting rights or voting restrictions outlined in those agreements should be placed on the certificates of stock?

A Yes, we discussed that.

Q Was that was Mr. Sankin?

A Yes, Mr. Sankin and Mr. Chaite.

Q And what was that discussion?

A I believe Mr. Chaite suggested, and Mr. Sankin, that it be impressed on the stock certificate. And I objected, claiming that they had the memorandum, which showed that while there was full trust and confidence, that there was no need to go further; and that my wife had

previously indicated to me that it was foolish, businesswise, to have a two-thirds interest in a business and give away a voting right that I owned. But still I had previously agreed, and I just couldn't see how I could deny that agreement. So I went ahead and signed the agreements, but asked them please not to impress it on the stock certificate, so that she wouldn't know that I did it.

(Tr. 4080)

Q And did that same discussion concern the purchase rights?

A This is the right of first purchase, and also the 50 per cent voting right.

Q To your knowledge, was a legend containing those rights impressed upon the certificates?

A No, they were not.

Q Now in late February or early March, 1959, was it those rights you were referring to when you expressed your dissatisfaction to Mrs. Garfield? Was it those rights or those restrictions?

A Well, what worried me was the fact that there was a provision in those agreements for arbitration, and it would be a delaying thing. I couldn't reach any decision, because I could be vetoed by Mr. Sankin.

And I told her, in view of the fact that I had lost confidence in Mr. Sankin, that I should have my voting rights. And that was the basis for giving him the 50 per cent right, even though he had a one-third interest, was because of the confidence I had in him. And when that was destroyed, I felt that, well, even if I didn't do it the right way, I felt I was entitled to get my two-thirds voting right back -- and that was all I wanted -- so that I could protect myself.

* * * * *

(Tr. 5111-5131)

JOSEPH A. GARFIELD

was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. DILANY:

Q Mr. Garfield, I show you Plaintiff's Exhibit 35 and ask you if you executed that document.

A Yes, I did.

Q And I also show you what has been marked for identification only as Defendant Garfield's Exhibit 11 and ask you if you can identify that document.

(Tr. 5112)

A Yes; this is a document that is somewhat similar to --

Q Well, I just asked you if you could identify it. Have you ever seen that before?

A Yes, I did.

Q When did you see it?

A The last part of April. Mr. Benn put this in front of me and said, "I think it would be advisable for you to sign this now, because we must show more assets in the corporation."

MR. BECK. I object, on the grounds it is hearsay to the intervenors, and move it be stricken.

THE COURT. Are you making any claim under this? You are making claim for irrevocable assignment, aren't you, of funds?

MR. BECK. Not Defendant Garfield's Exhibit No. 11 for identification.

THE COURT. You are raising it under Plaintiff's Exhibit 35, I believe.

I will hear it. This was April 1959?

THE WITNESS. In the last part of April 1959.

THE COURT. Very well.

BY MR. DULANY:

Q And where did this conversation take place, Mr. Garfield, if you recall?

A Yes, I do recall. It took place in the Columbus
(Tr. 5113) Hotel, in Miami.

Q And what part of the Columbus Hotel?

A Well, all the meetings took place at what appeared to be Mr. Benn's office in the mezzanine, at the stenographer's desk.

Q Did you have any further conversation with him about whether you would or would not sign that document? -- which has been marked for identification as Defendant Garfield's Exhibit 11.

A Well, I refused to sign it at that time.

Q Referring now to Plaintiff Sankin's Exhibit 35, when did you execute that document?

A This document was executed on May 4, 1959.

Q And where was it executed?

A At the mezzanine in the Columbus Hotel.

Q Did you have any conversation with Mr. Benn at that time with regard to that document?

A Yes, considerable conversation, because I --

Q Just tell me now, as best you can recall, what he said to you and what you said to him.

A Mr. Benn told me it was necessary for him to make the corporation look like it had substance and validity, and it was difficult without having any money other than the thousand dollars I had previously

given him. "And," he says, (Tr. 5114) "Mr. Sankin is going to attack it, and we won't be able to accomplish our purpose of getting your voting rights. And I recommend that it be signed." He was persuasive, and I signed it.

Q Did you receive from him anything of value for the signing of that document?

A Nothing at all.

MR. DULANY. Your Honor, I would like to introduce Defendant's Exhibit 11 for identification, which is really an original and three carbons all stapled together.

THE COURT. Mr. Beck?

MR. BECK. I haven't seen it.

THE COURT. Let Mr. Beck see it.

MR. BECK. I object. It is an unsigned copy of what is headed an irrevocable assignment. It is irrelevant and immaterial to any of the issues in the intervenors' complaint.

THE COURT. Mr. Genn?

MR. GENN. No objection, Your Honor.

THE COURT. Garfield's 11 will be received in evidence.

(The irrevocable assignment, heretofore marked for identification as Defendant Garfield Exhibit 11, was received in evidence.)

(Tr. 5115)

BY MR. DULANY:

Q Mr. Garfield, you referred to the thousand dollars you had previously put into the corporation. When was that?

A On April 20th when we were drawing up, when Mr. Benn was drawing up the final escrow for Julius Sankin, Inc., he came to me and asked me for a thousand dollars.

I said, "What do you want a thousand dollars for?"

He said, "Well, we have to start the corporation; and, as long as you own it, you might as well give me the money for the stock now, because we have to start a bank account."

I made out a check to Mr. James T. Benn for \$1,000. He tore it up, and he said, "No, we can't show this; we can't let anyone know you own this corporation. We will have to keep it the way we originally planned." He said, "I'm telling you that I have to have it in cash."

I said, "Well, I never carry very much cash. I always pay by check."

Then he said, "Well I tell you what you do. Make a check out to cash, and I will accept that" -- which I did, in the presence of my wife, and I believe Mr. Holloway of Mr. Saunders' office.

He then went out with this instrument to a girl outside of this particular meeting room, and had some words endorsed on the back of the check, and came back and said, (Tr. 5116) "Sign this, so it will look like I gave you the cash for it." And I signed it.

MR. BECK. I object, on the grounds that the last answer is hearsay as to intervenors, and move it be stricken.

THE COURT. Overruled. Motion denied.

BY MR. DULANY:

Q Mr. Garfield, I show you what has been marked as Plaintiff's Exhibit 27 and ask you if you can identify that.

A Yes. This is the check that I made out on April 20th, 1959.

Q Mr. Garfield, were you present when the bank account was opened for 5410?

A Yes, I was.

Q And when was that, sir?

A On the 21st. The next day, after we had completed the escrow arrangements at the Riggs National Bank, Mr. Saunders, Mr. Benn, myself and Mrs. Garfield walked around the corner to the commercial part of the Riggs National Bank. Mr. Benn said, "Now I think you and Janet had better sit down here at the" -- there was a marble balustrade -- "and Mr. Saunders and I will open the account for 5410."

Dutifully we sat down. Mr. Benn and Mr. Saunders spoke to a man about 15 or 16 feet away, at a desk; and they talked to him, and signed some papers. And of course we (Tr. 5117) assumed that the bank account was opened at that time.

Q Do you know whether Mr. Benn had that check with him at that time?

A I assume he did, but I really don't know.

MR. BECK. Your Honor, I object, and I move to strike the last answer.

THE COURT. I will grant that motion.

MR. DULANY. I have no objection to striking that.

BY MR. DULANY:

Q Mr. Garfield, I ask you if you have ever seen Plaintiff's Exhibit 41 and 42, or rather the originals of those, those purporting to be photo copies.

A Yes.

Q Did you ever make demand on Mr. Benn for the payment of any of those notes?

A I never did. I wasn't supposed to.

Q Did you ever ask him for any collateral security on any of those notes?

A No, sir, I never did.

Q Now, Mr. Garfield, have you ever had in your possession a file of International Timber Company, Surinam American Timber Company, or any other timber company?

A No, sir; I have no knowledge of any files. I have never received any. I know nothing about the lumber business (Tr. 5118) or timber business. And I was amazed when I heard yesterday --

Q No; just answer the question.

THE COURT. Your answer is you never had any files of these corporations?

THE WITNESS. I never did.

BY MR. DULANY:

Q Mr. Benn never gave you any such files?

A No, sir, he never did.

Q Have you ever invested in any timber or timber firm of any kind?

A No, sir, I haven't.

Q Do you have any knowledge of any timber firms or timber funds of any kind?

MR. BECK. Your Honor, I object. I believe these questions are leading.

THE COURT. Well I would say maybe the last two were.

MR. DULANY. I have no further questions.

THE COURT. All right. Do you want to go first, Mr. Genn?

MR. GENN. I have no questions.

THE COURT. Mr. Beck?

MR. BECK. Yes, Your Honor, if you will indulge me a

moment.

(Tr. 5119)

CROSS EXAMINATION

BY MR. BECK:

Q Mr. Garfield, I hand you Garfield's Exhibit No. 11 for identification. I believe it is your testimony --

THE COURT. Just a minute. I think that is in now, is it not?

MR. BECK. Yes, Your Honor, I am sorry. It is Exhibit 11.

THE COURT. Yes.

BY MR. BECK:

Q You had some conversation with Mr. Benn at the Columbus Hotel with regard to that?

A Oh yes. There was always lots of conversation at the Columbus Hotel, at the desk of the public stenographer.

Q Was Mrs. Garfield present at this particular conversation?

A Yes, she was.

Q Did she participate in the conversation?

A I believe so, usually at one point or another.

Q Was there anyone else present?

A Mrs. Downey, --

Q Anyone else?

A -- the public stenographer.

Q Anyone else?

A And Mr. Benn, of course.

(Tr. 5120)

Q Do you have any recollection of Mrs. Garfield reading Garfield Exhibit 11 at that time?

A I believe she did.

Q Did Mrs. Garfield state one way or the other whether you should sign it?

A I believe she indicated that I oughtn't to sign it.

Q That you should not sign it?

A Yes.

Q Plaintiff's Exhibit 35, that you testified about, was there also a meeting at the Columbus Hotel concerning that?

A Yes, there was.

Q That was about, what, five or six days later?

A On May 4th, 1959.

Q Who was present at that meeting?

A The same people were present.

Q Anyone else?

A No, the same people, no one else.

Q Was there any discussion concerning that document?

A Yes, there was.

Q Did Mrs. Garfield read that document?

A Yes, she did.

Q Did she tell you, one way or the other, or advise you, one way or the other, as to whether you should sign it?

(Tr. 5121)

A She thought I oughtn't sign it.

Q Did you at any time refuse to sign it?

A Yes, I refused to sign it the previous time, on April the, some time the last of the month of April.

Q I mean at the time of your meeting on May 4th, 1959 did you refuse to sign it?

A No; I signed everything then. He was very persuasive that day -- and he can be persuasive, when you trust him.

Q Who was persuasive?

A Mr. Benn.

Q How about Mrs. Garfield? Was she persuasive on that day?

A Well, she was, in my mind, probably more capable of analyzing these things than I was, I believe, because, even though originally Mrs. Garfield, my wife, indicated Mr. Benn had decided to turn over a new leaf and become an honest man, and he was doing this to make up for a previous injustice to me, I guess by this time maybe we were kind of worried -- although I wasn't. I was concerned, but I felt that Mr. Benn was going to carry through, and that I owned 5410, and anything I signed wouldn't be of any consequence, because if I owned the 5410 Connecticut Avenue Corporation, then I owned all these documents, too.

(Tr. 5122)

Q Is Mrs. Garfield a member of the Bar?

A No, she is not a member of the Bar.

Q Has she had any legal training?

A No, no legal training, just common sense.

Q Between April 28th, 1959 and May 4th, 1959 did you and Mrs. Garfield discuss Garfield's Exhibit 11 and Plaintiff's Exhibit 35?

A I don't think so.

Q Between April 28th, 1959 and May 4th, 1959 did you and Mr. Benn discuss Garfield's Exhibit 11 and Plaintiff's Exhibit 35?

A Yes, I think so. I believe we --

Q On how many occasions?

A Well, he was in the habit of calling almost every evening to give me a report as to what was going on in Washington. And it was during these telephone calls that he would tell me that I was so lucky that I had him for a "big brother," because he had found that Mr. Sankin was stealing that corporation blind, and I was so fortunate I had somebody to find out for me.

And he kept telling me that, "However, we must protect the bona fides of the deal" -- those are his words -- "we must protect that, because if they attack that," he said, "they will throw it all out."

(Tr. 5123)

I discussed it with him several times on that same basis.

Q Did Mrs. Garfield participate in those discussions?

A I don't know. She may have on one of them -- not participating, but listening on an extension phone.

Q You testified that you got absolutely nothing in return for signing Plaintiff's Exhibit 35, which is headed an irrevocable assignment. Why did you sign it?

A It was signed -- I wasn't to get anything for it -- and originally the entire development by Mr. Benn was not for him to give me any money, but just to secure a right, a voting right, according to the amount of stock I owned in Garfield & Sankin and for no other purpose -- not to dislodge Mr. Sankin, not to do anything to him, except to get my voting rights so I could protect myself when I found it necessary.

Q Did Mr. Benn tell you that Plaintiff's Exhibit 35 was necessary in order to make a transfer of the money loans that were due to you from the corporation?

A Well, he kept telling me, "You shouldn't worry about it."

Q Did he tell you that? --

A He didn't tell me exactly what --

Q -- that Plaintiff's Exhibit 35 was necessary in order to complete the transfer from you to 5410 of the money (Tr. 5124) loans due you from this project?

A Well, I may not be direct in answering you, --

Q Then be indirect.

A -- but I will have to tell you that he said it was necessary to give substance to the corporation, "because the corporation has no money except the thousand dollars that you have previously given me."

Q Didn't he tell you that that irrevocable assignment, Plaintiff's Exhibit 35, was necessary in order to implement the stock purchase agreement, which is Plaintiff's Exhibit 25?

A I don't think so. I don't think it was ever discussed, so far as I recall. It was mainly and only for the purpose of giving substance to the corporation. Those are his words.

Q Isn't it a fact, Mr. Garfield, that the purchase price arrived at in Plaintiff's Exhibit 25 -- which is the stock purchase agreement for the sale of 66-2/3 shares of Julius Sankin, Inc. -- was based upon the amount of monies that you had advanced?

THE COURT. Garfield & Sankin, Inc. Julius Sankin, Inc. didn't come in until later.

MR. BECK. Your Honor, that is the time I am talking about.

THE COURT. You are speaking about --

(Tr. 5125)

MR. BECK. This is the 21st, Your Honor.

THE COURT. I am sorry. All right.

THE WITNESS. Now I'm not --

THE COURT. Put the question again -- or do you want the reporter to read it?

MR. BECK. May I start over again?

THE COURT. Yes.

BY MR. BECK:

Q Mr. Garfield, wasn't the \$200,000 purchase figure that was used in PLAINTIFF's Exhibit 35, the stock purchase agreement of April 21, 1959 whereby you sold your 66-2/3 shares of Julius Sankin, Inc. stock to 5410, based upon the monies that you had advanced and which you thought were due to you from this project?

MR. DULANY. I would object, Your Honor. The document I think speaks for itself. IT is a legal document and I think is subject to construction by the Court, and not this witness' construction.

THE COURT. He is talking about the conversation he had here with Benn at the Columbus Hotel, and why the irrevocable assignment was given. And you asked what consideration there was.

MR. DULANY. I did. But I think, Your Honor, the question related to wasn't this the basis of the agreement; (Tr. 5126) and I think if he is getting into what discussions were had, that is something else.

MR. BECK. The basis of the \$200,000 purchase figure that was used in it. He says there was no consideration for the irrevocable assignment. There has been evidence to the effect that the irrevocable assignment was an instrument to implement the stock purchase here. Now I want to know if it wasn't the money loans that was the basis for the \$200,000 figure in the stock purchase.

THE COURT. Can you answer that?

THE WITNESS. Yes, sir, I think so.

THE COURT. Go ahead and answer it.

THE WITNESS. I have no hesitancy about answering that. The funds that I had advanced to the corporation had nothing to do with this agreement.

BY MR. BECK:

Q They had nothing to do with the stock purchase agreement?

A Nothing at all. We never discussed it.

Q What was the basis of the \$200,000 purchase figure in the stock purchase agreement?

A I can answer that, I believe. Mr. Benn, as is his wont, will sit down with a pad and pencil and figure a formula. I don't know how he arrives at these formulas. He (Tr. 5127) said this is what the price should be. So that's what the price was.

I had nothing to do with it. It could have been one dollar or five million. I had nothing to do with it. He developed all of these figures, in all of these papers.

Q As far as you know, there is no basis whatsoever for attaching a \$200,000 purchase figure in that stock purchase agreement?

A None at all.

Q How did you talk Mr. Sankin into paying \$200,000 for that 66-2/3 shares of Julius Sankin, Inc.?

MR. DULANY. I think that is getting beyond the direct now, Your Honor. I would object.

THE COURT. I sustain it.

BY MR. BECK:

Q Did you use the stock purchase agreement which is Plaintiff's Exhibit 25 in entering into your May 26th agreements with Mr. Sankin?

MR. DULANY. Objection, Your Honor.

THE COURT. Sustained.

BY MR. BECK:

Q Is it your testimony that at the time you signed Plaintiff's Exhibit 36 you knew nothing about the timber or logging industry, or the lumber business?

(Tr 5128)

A I knew nothing about it before then, I knew nothing about it then, and I know nothing about it today.

Q Why did you sign Plaintiff's Exhibit 36?

A I believe I signed it because I was a damn fool.

THE COURT. Well, I think you want to withdraw that and give another answer.

THE WITNESS. Yes.

THE COURT. Why did you sign it?

THE WITNESS. Because Mr. Benn told me to sign it. He said, "This is the only way we can show that the corporation has a value, that the 5410 Connecticut Avenue Corporation has a value." He says, "Without this, they can attack it and it will not be a valid corporation, and you will never get your voting rights; and, if I know Mr. Sankin, and as I have investigated him and I have checked him, you won't stand a chance." And with all his persuasiveness and all the innuendos he threw in about Mr. Sankin, I just signed it.

BY MR. BECK:

Q Did you ever refuse to sign it?

A Did I refuse?

Q Ever refuse.

A No, I didn't. This is only one time. He presented this on May 4th, and it was signed on May 4th.

Q Where was that presented to you?

(Tr. 5129)

A At the usual place -- the mezzanine of the Columbus Hotel, at the stenographer's desk.

Q With the usual people present?

A The usual people were present, yes, sir.

Q Did Mrs. Garfield participate in the discussion concerning that document?

A I don't recall.

Q Do you know whether she read it?

A I don't recall that. She may have.

Q Do you recall whether she advised you or tried to persuade you one way or another, whether to sign it or not to sign it?

A No. At that time I think I indicated that I would have to sign it, because all the other documents were signed. This was just carrying out the setup that Mr. Benn had created.

Q When Mrs. Garfield, Mr. Benn, Mr. Saunders and you went over to Riggs Bank to open the bank account, did you discuss this deal, this transaction, with Mr. Saunders?

MR. DULANY. I object, Your Honor. It is beyond the scope.

MR. BECK. He said they went and opened a bank account; that the four of them went over.

THE COURT. This is the thousand-dollar bank account?

MR. BECK. Yes.

(Tr. 5130)

MR. DULANY. I am sorry. I didn't understand it.

THE COURT. You may answer.

THE WITNESS. During the walk from the trust department of the Riggs Bank to the commercial department, Mr. Benn walked with me part of

the way and cautioned me to say nothing about anything that had happened before Mr. Saunders. He says, "We must use him as a front."

BY MR. BECK:

Q Did you discuss this in the presence of Mr. Saunders,--

A No.

Q --at that time or any other time?

A No. Mr. Saunders never knew at that time.

Q What was this date?

A This was April 21st, 1959.

Q And you had been out to Mr. Sankin's and told him you had sold out?

A No; this was prior to that.

Q So you opened the bank account prior to --

A Prior to going out to the Garfield Apartments, yes.

Q There was a check for \$1,000, your check for \$1,000?

A That is what I gave to Mr. Benn the day previous, yes, sir.

Q And that was Plaintiff's Exhibit -- do you have that there -- Plaintiff's Exhibit 27?

A Yes.

(Tr. 5131)

Q Did you give Mr. Benn any other checks for \$1,000 during that period of time?

A This was the only check that was issued to Mr. Benn for that specific purpose of buying the stock of 5410 Connecticut Avenue Corporation.

Q Do you know whether Plaintiff's Exhibit 27 was deposited on April 21st?

A I do not.

Q You and Mrs. Garfield sat out in the anteroom --

MR. DULANY. May it please the Court, I think the check shows it was made out to cash and was not deposited as such, but was paid.

THE COURT. He was asked if he knew whether it was deposited, and he said he did not.

THE WITNESS. It didn't make any difference to me. It was paid as requested and for that purpose.

BY MR. BECK:

Q Actually none of these matters made any difference to you, so long as your plan to deprive Mr. Sankin of his voting rights was being carried out; is that correct?

MR. DULANY. I object to that, Your Honor.

THE COURT. I sustain it.

MR. BECK. Did you sustain that, Your Honor?

THE COURT. Yes. I will be reading that in your brief.

* * * * *

(Tr. 5192-5244)

DIRECT EXAMINATION

BY MR. SEEGMILLER:

Q Mr. Garfield, I would like to ask you a few questions which will be limited as to time and subject matter. The time will be beginning with April 21, 1959 and ending May 26, 1959, both days inclusive. The subject matter will be your relationships with Mr. Sankin or Mr. Benn or with anyone else with reference to 5410 Connecticut Avenue Corporation, Garfield and Sankin, Julius Sankin, Inc. or the apartment house known as Garfield Apartments.

Now, during that period of time and with respect to that subject matter, did you tell Mr. Sankin anything that was not true?

A I really don't know how to answer that question. Of course, I didn't tell him anything that was not true.

Q You did not tell him anything that was not true?

A I don't think so. I may have been evasive in some respects in so far as what I was doing but that, in my mind, was nothing that was untrue.

Q Well, let's go specifically to April 21, 1959. It has been testified here today that you told Mr. Sankin on that day that you had sold your interest lock, stock and barrel. Did you say that in effect?

A Yes, I did.

(Tr. 5193)

Q And that was a true statement according --

A No, it wasn't a true statement but it was carrying out the evasion that I indicated earlier in this sham arrangement with Mr. Benn.

Q But it wasn't a true statement?

A To secure back --

Q That will be enough. It wasn't a true statement?

MR. DULANY: Your Honor, I think he can finish his sentence.

THE COURT: Let him finish. Go ahead and finish.

THE WITNESS: This places me in a very peculiar position because in effect it wasn't the truth, in so far as I was concerned. So far as Mr. Sankin was concerned, it was meant to have him believe that it was the truth so that I could get my stock into 5410, according to Mr. Benn's arrangement, and so then it would be free of voting restrictions. This was the primary purpose of the whole business that Mr. Benn developed for me.

Q Now, was it true that you had sold to 5410 Connecticut Avenue Corporation or not? According to your belief at that time.

(Tr. 5194) A According to my belief -- I really didn't have very much belief. I just relied on Mr. Benn. Mr. Benn said if we had gotten the unendorsed stock certificates of the two corporations into 5410, that they would then be free of the voting restriction and then I could protect myself. And his full role in this whole business was to protect me, and to get me back my voting

rights, which I felt I had to have to protect me against what I considered improper withdrawals of funds from a corporation that I had advanced all the money for.

MR. SEEGMILLER: I would like to be patient but I think this is going far beyond the question.

THE COURT: Yes, that is going beyond the question.

THE WITNESS: I am sorry, I didn't mean to go too far.

BY MR. SEEGMILLER:

Q Now, you suggested the point that I want to get at, Mr. Garfield.

Did you intend that 5410 would in effect purchase the stock and you would have the stock of 5410 or did you intend that 5410 wouldn't get anything? What was your intention?

A Well --

MR. DULANY: Just a minute.

THE COURT: Just a second.

(Tr. 5195) MR. DULANY: Your Honor, that, timewise, is a tremendously broad question.

MR. SEEGMILLER: I have limited the time.

THE COURT: He has given him in reference -- as I understand it was from April 21 --

MR. SEEGMILLER: April 21 to May 26.

THE COURT: -- to May 26.

MR. SEEGMILLER: I wanted to include those two dates for reasons well known here, of course.

THE COURT: The question, as I understand it, is this, Mr. Garfield: When you told Sankin and when you dealt with Benn during this period, did you intend that your stock in Garfield and Sankin, Inc. and Julius

Sankin, Inc. was sold to 5410 or did you have a different intention?

Is that the question?

MR. SEEGMILLER: That is the question, if the Court please.

THE WITNESS: I would like to be specific in answering your question, but it is very difficult because I had conflicting ideas in my own mind at that time and I was actually going along with Mr. Benn's plan to effect a transfer into 5410, which I owned, so that if 5410 owned the stock, then I would be in the same position I was before, no change, except that the stock would be in a different name.

(Tr. 5196)

Actually, I never thought of the end result. If I had -- this would have been a very poor thing for me to do and I don't really know how I got into it, but I am in it.

MR. SEEGMILLER: I imagine that is far enough.

THE COURT: That is far enough.

MR. SEEGMILLER: I don't like to close the man off but that has gone far enough.

BY MR. SEEGMILLER:

Q Now, speaking of the end result, had you given any thought at all -- and I am still restricting it to the same period of time -- to just how you would operate with Mr. Sankin when you got the 5410 stock in your name? Had you thought about that at all?

A Yes, I did not.

Q You did not?

A I mean, the answer is, I did not. As a matter of fact, it goes back to the emotional state I was in, and I never gave any thought to that.

Q It has been testified that on April 21 it was said, either

by you or by Mr. Benn in your presence, that you were completely out and Mr. Sankin would have to deal with Mr. Benn from here on out.

Was that said either by you or Mr. Benn in your presence on April 21?

(Tr. 5197) A I would like to answer that and explain it, if you will, please.

Yes, I said that. Mr. Benn had told me to say very little, that he would do all the talking, and all I was to do was to tell Mr. Sankin that he would now have to deal with him.

MR. SEEGMILLER: Could I have Plaintiff's Exhibit 22, please, Mr. Clerk.

BY MR. SEEGMILLER:

Q So that you will know what I am speaking of, Mr. Sankin --

A Garfield.

Q -- I show you Plaintiff's Exhibit No. 22.

THE COURT: Garfield, you mean. You said Mr. Sankin but you meant Mr. Garfield.

MR. SEEGMILLER: Yes, I am sorry, Mr. Garfield.

BY MR. SEEGMILLER:

Q So that you will know what I am speaking about, that does bear your signature, doesn't it?

A Yes, it does.

Q I would like to read to you a part of a paragraph or a paragraph from that exhibit. It is Paragraph No. 6, and it says:

(Tr. 5198) "Seller agrees to remain with Garfield and Sankin, Inc. until such time as the construction of said 165-unit apartment building is finished and a complete certificate of occupancy

therefor has been issued and received through the proper authorities; and further seller agrees to remain with Garfield and Sankin, Inc. and be responsible not only for the completion of the building as set forth in the plans and specifications but also remain with said corporation and be responsible to the purchaser for the completion of the permanent mortgage which is in process of being consummated and closed within the next 120 days, and shall be responsible for the construction loan being paid off and released. All proceeds of the permanent mortgage loan above the amount of other liens, encumbrances, loans, liabilities and claims shall remain in Garfield and Sankin, Inc."

Were you aware that that paragraph was in this agreement on April 21, 1959?

(Tr. 5199) A I can't say, yes, and I can't say, no. Actually, it all goes back to the same thing I have been saying, and I mean this: So long as I was going to own 5410, all these documents didn't mean very much because the stock would go back to 5410 and I would own 5410, and I didn't give too much thought to the wording of the documents. And Mr. Benn had indicated that we must make this tight -- and whatever he meant by that -- so that nobody can attack it.

Q Well, did you in fact remain with Garfield and Sankin, Inc. to help ascertain that the mortgage was completed and the building occupied and completed?

A I wish I had.

Q Did you? No, no, did you?

THE COURT: The answer?

THE WITNESS: No, I didn't, because Mr. Benn took it out of my hands. He just took control.

BY MR. SEEGMILLER:

Q And you didn't offer to, did you?

A I didn't have the opportunity.

Q Mr. Sankin --

THE COURT: Mr. Garfield.

BY MR. SEEGMILLER:

Q Mr. Garfield, one other matter from this Exhibit No. 6.

It is the Notary Public certification.

THE COURT: Is this the same exhibit, sir?

MR. SEEGMILLER: The same exhibit.

THE COURT: It is No. 22.

MR. SEEGMILLER: No. 22, I am sorry.

THE COURT: Yes.

(Tr. 5200)

BY MR. SEEGMILLER:

Q "I hereby certify that on this 14th day of March, 1959, before me personally came Joseph A. Garfield and James T. Benn, to me known to be the individuals described in and who executed the foregoing stock purchase agreement dated March 14, 1959, and have acknowledged before me that they executed the same for the purposes therein stated."

Has the Notary Public made a correct recitation of fact in that respect?

A The Notary Public has not made a correct statement of fact in that notarization.

Q Is this because you did not acknowledge to the Notary that you had signed this document for the purposes stated?

A No, not that.

Q What was the error?

A The date is in error. The date is wrong. The actual and true date is April 6.

Q And did you know that at the time?

A Yes, I did, and I protested. I said: Why do you do this? This is not the date we are preparing these instruments.

He said: Well, this is the way it has got to be. He said: I have all my notes destroyed so no one can check it back.
(Tr. 5201)

Q Did you tell the Notary Public that the date was April 6 instead of the 14th?

A She knew it.

Q And you actually appeared before the Notary on April 6?

A She did what Mr. Benn told her to do.

Q And it was actually April 6?

A It was actually April 6.

Q You allowed the document to go forward, nevertheless, knowing that error was in it, is that true?

A I was being led by Mr. Benn, Mr. Seegmiller.

Q You allowed it to go forward knowing that, is that your answer?

A Yes, sir.

Q Did you acknowledge to the Notary, then, that you had executed that document for the purposes therein expressed, regardless of the date?

A I don't think it meant anything to the Notary, whether we did or not.

Q That isn't my question.

THE COURT: The question is, did you acknowledge to the notary?

(Tr. 5202) THE WITNESS: No, I don't think so. I just said that was my signature. That is about all.

BY MR. SEEGMILLER:

Q And you allowed her to make that recitation even though it wasn't true without correcting her on it?

A I never read it, sir.

Q You never read it?

A Except the date.

Q You are a member of the Bar, aren't you?

A I have been.

Q A law graduate?

A Yes, sir.

Q And do you mean to tell me you don't know what a Notary certification to a document means?

A I do know what it means. It meant nothing to me at that time because it was a sham transaction. I would have been certainly much more careful if it was a real transaction. This was not a real one.

Q What does a Notary's acknowledgment mean to you?

A It means that the statements you make therein are true to the best of your knowledge. And I realize this was something I shouldn't have done and I want to admit that.

Q So on that occasion you were participating in at least two things you knew were not true: The first was the date and the second was (Tr. 5203) the failure for you to say that you acknowledged that for the purposes stated. Both of those things were not true and you allowed it to go through, is that right?

A As part of this whole scheme that Mr. Benn developed.

Q Is your answer, yes, to my last question?

A Yes, subject to my explanation, sir.

MR. SEEGMILLER: May I have, Mr. Clerk, please, a number of exhibits. I would like to have Plaintiff's Exhibits 23, 25, 26, 32 and 35. I want to use them only one at a time. I could start with 23, if you have it.

BY MR. SEEGMILLER:

Q Mr. Garfield, I show you Plaintiff's Exhibit 23, and for your information, to identify it, does it have your signature?

A Yes, that is my signature.

Q Do you recall that document?

A Yes, I recall that agreement.

Q Now, from that document I would like to read a sentence or two, commencing in Paragraph 4 of this agreement.

May I go back for just a minute. The opening paragraph of the document, I may point out, identifies Mr. Garfield as party of the first part and 5410 Connecticut Avenue Corporation as party of the second part.

(Tr. 5204)

"The first and second parties do hereby authorize the said escrow agent to keep and preserve the said properties in its possession until the payment in full of the said promissory note hereinbefore referred to is made to the escrow agent for the account of the party of the first part but not beyond 12/1/59 unless extended by both parties in writing to escrow agent, or if party of the second part defaults in payment of any of its undertakings under the terms of the above-described note and in the event the said note is not paid in accordance with its terms, to thereupon deliver the said 66-2/3 shares of stock hereinbefore described to the party of the first part, and it is expressly understood that in the event the party of the second part fails, neglects or refuses to pay said note when due, or before 12/1/59, or extension thereof, then the

escrow agent is hereby authorized to deliver the aforesaid shares of stock to the party of the first part and to return to the party of the second part the said note and any cash payments held by the escrow agent for the account of the party of the first part."

(Tr.5205) When you signed that agreement, were you aware that that paragraph was in it, Mr. Garfield?

A I am dimly aware that there were a lot of statements made and actually they didn't mean too much to me.

Q I would invite your attention particularly to a line written in here after the agreement had been typed in the first instance and ask you if your initials appear on the margin at the end of that line?

A Yes, my initials do appear.

Q Would you say that your attention was specifically directed to that paragraph by reason of putting your initials on it?

A No, I don't think so. I think the bank inserted that at the Riggs Trust Department.

Q Now, at the end of that agreement there is a recitation signed by a Notary Public and it says:

"Personally appeared Joseph A. Garfield and James T. Benn, known to me, acknowledging this their act and deed this 21st day of April, 1959."

Is that a correct recitation that the Notary Public has made there?

A That I appeared and signed it.

Q The Notary says you appeared and acknowledged it as your act and deed. Is that correct?

A I don't know that the Notary could notarize anything
(Tr. 5206) but my signature and that I signed those documents, and that is what the Notary did.

Q Did you acknowledge it as your act and deed?

A Well, of course, I must have if I accepted the document and the documents were used, and for the purposes indicated, yes.

Q So the Notary's statement is correct, you did acknowledge that as your act and deed, is that right?

A As I have in all the documents, wherever they were notarized, even though the whole over-all plan -- all these documents meant nothing, except to secure the stock, my stock free from any voting restrictions. That was the sole and only purpose.

Q I invite your attention, Mr. Garfield, to Plaintiff's Exhibit 25, and so that you will understand what I am reading from, I will ask you if it does bear your signature?

A Yes, sir.

Q Take a look at the agreement. Do you know what that is?

A Yes.

Q At the conclusion of that agreement, Mr. Garfield, there is a Notary's certification as follows:

"I certify that on this 21st day of April, 1959, personally appeared before me Joseph A. Garfield (Tr. 5207) and James T. Benn, to me known to be the individuals described in and who executed the foregoing stock purchase agreement dated April 21, 1959, and have acknowledged before me that they executed the same for the purposes therein expressed."

Is that recitation by the Notary true?

A Yes, sir.

Q You did acknowledge that?

A It was true in so far as that document and all the other documents is concerned.

Q You did acknowledge that you executed it for the purposes therein expressed?

A You make it very difficult for me to answer, no.

Q I intend to make it difficult, to get the truth out of you.

A At the same time it really isn't, yes, and it really isn't, no. I don't know how to answer it.

Q Did you acknowledge it? A plain, simple question.

A I did acknowledge it but it wasn't as it appears.

Q What you acknowledged was not true, is that right?

A No, it is not right and not wrong. I am sorry, I don't know how to express it. My words are limited. All I can say, it is part of the over-all scheme for the purpose of getting my stock into 5410 for the purpose of freeing it (Tr. 5208) from the voting restrictions. All these documents were executed and were notarized, this is true.

Q Now, without going into all of the detail with each document separately, I would ask you, Mr. Garfield, with respect to a certain exchange agreement which you signed with 5410 on May 4, 1959, do you recall that?

A I don't remember.

Q Never mind, I had better get the exhibit.

THE COURT: Plaintiff's 32.

MR. SEEGMILLER: It is 32.

THE COURT: I think that is the one you are speaking of.

BY MR. SEEGMILLER:

Q I show you Plaintiff's 32, Mr. Garfield. Does it bear your signature?

A Yes, sir, it does.

Q Do you know what this document is?

A Oh, yes, yes, I recall this now.

Q That one, Mr. Garfield, has a Notary's certification which reads as follows:

"I hereby certify that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, James T. Benn, as president of 5410 Connecticut (Tr. 5209) Avenue Corporation, and Joseph A. Garfield, individually, to me well known to be the persons described in and who executed the foregoing exchange agreement, and acknowledged before me that they executed the same freely and voluntarily for the purposes therein expressed."

Is that a correct recitation of fact by the Notary Public?

A In effect, I signed the document, but no consideration was ever given to me.

Q That isn't the question, Mr. Garfield.

A The answer is that evidence of those agreements are not right, but I did sign the agreements as they are in all the agreements.

Q I want to know -- the Notary says you acknowledged freely and voluntarily before her or before him -- whoever it was -- that you had signed this document for the purposes therein expressed. Has the Notary stated a true statement of facts?

A If you are implying --

Q I am not implying anything. I want to know. It is just a question. Did the Notary state the facts correctly?

A The Notary couldn't know anything about the facts.

(Tr. 5210) All the Notary did was acknowledge my signature. That is all I expected it was.

Q That isn't what the Notary said was done. The Notary said that you acknowledged before him that you had freeland and voluntarily executed the document for the purposes therein stated.

Now, was the Notary right or wrong in making that statement?

A I don't think I read any statements fully. I just acknowledged my signature on those documents. This is what I do remember, that I signed the documents. I don't know what else I can say.

Q Is it your testimony then that all you told the Notary was that you signed the documents? Is that all you told the Notary?

A All the Notary said, is this your signature? And I said, yes. She put her stamp on it.

Q You did not acknowledge that it was executed for the purposes therein stated, is that right?

A During these entire -- all these meetings that were held, mainly in the hotel mezzanine --

THE COURT: Let's not go into that.

Where was this acknowledgment taken?

MR. SEEGMILLER: This acknowledgment was taken in
(Tr. 5211) the State of Florida, County of Dade, Notary Public Elva S. Darney.

THE WITNESS: That is Downey.

MR. SEEGMILLER: Edna S. Downey, D-o-w-n-e-y, I guess.
And further address on it, I don't have.

THE COURT: It is not a question of all the meetings. It is a question that Mr. Seegmiller wants to know with respect to the time you signed this document and your signature was acknowledged.

Now what is your question, Mr. Seegmiller? Put the question to him.

BY MR. SEEGMILLER:

Q Did you tell the Notary Public that you freely and voluntarily acknowledged that document for the purposes therein expressed?

A I did not. All I did was to acknowledge that my signature was mine -- my signature on that document. That is all I did. That is all she ever asked me. If any other writing appears there, it was developed or designed by Mr. Benn. I never read it.

Q Did you have a copy of this agreement after that date?

A Mr. Benn --

Q No, no.

(Tr. 5212) A -- kept most of the agreements, all the documents.

Q This particular agreement, did you take a copy of it for your own files on the date it was executed?

A I don't recall that. I know I had very few documents, because he had my files and my checks and he kept most of the documents.

Q Let me ask you this: Did you in fact execute this agreement for the purposes therein stated or didn't you?

A It was a sham -- it was a fictitious arrangement. It is all part of the same ball of wool. It is all bound together. I can't separate it.

Q Is your answer, no, or you don't know or, yes?
What is your answer?

A My answer is this:

MR. DULANY: Your Honor, I think he has answered it.

MR. SEEGMILLER: I don't think I have had an answer.

THE COURT: Well, as to this particular instrument and the purpose of your signing it, why did you sign it?

THE WITNESS: To continue with the sham arrangement originally initiated by Mr. Benn and me.

BY MR. SEEGMILLER.

Q Now, I think there were other documents, Mr. Garfield, and I am not going to take the time to identify each one separately, which you signed before a Notary Public (Tr. 5213) between these two dates I have given you, April 21 and May 26, and in so far as they may recite that you acknowledged those documents to be for the purposes therein stated, would they be true or wouldn't they?

A The documents?

Q Yes.

A None of them were true.

Q I refer particularly to the irrevocable assignment dated May 4, 1959, to a receipt for the stock certificate dated May 4, 1959. If those documents recite that you signed them for the purposes therein stated, that would not be true?

A None of the documents expressed any of the truth of the matter.

MR. SEEGMILLER: If the Court please, I wonder if I could have the file that contains Mr. Garfield's original cross-claim that we are here trying.

THE COURT: Yes, sir. This cross-claim we are trying here?

MR. SEEGMILLER: Yes, the cross-claim that we are now trying.

(Whereupon the Court file was submitted to Mr. Seegmiller.)

(Tr. 5214)

BY MR. SEEGMILLER:

Q Mr. Garfield, on the document which you filed in this Court as a cross-claim, this recitation is contained:

"State of Florida

"County of Dade

"I, Joseph A. Garfield, do solemnly swear that
I have read the foregoing and annexed answer and cross-
claim by me subscribed and know the contents thereof, that
the matters and things therein stated are true, except those
stated on information and belief, and as to those I verily
believe them to be true."

This shows your signature at that point. And beneath it is:

"Subscribed and sworn to before me this 22nd day of
June, 1959."

And a signature of a Notary Public.

THE COURT: Mrs. Downey?

MR. SEEGMILLER: This is Howard S. Wickert. It isn't

Mrs. Downey.

BY MR. SEEGMILLER:

Q Was that a correct statement? The Notary Public says you
subscribed and swore to that before him on that date. Was that correct?

A Yes, sir.

(Tr. 5215)

Q Are those facts true in that document?

A Yes, sir.

Q Now, when you took the witness stand here in this case,
you swore to tell the truth, didn't you?

A I did.

Q Are you telling the truth?

A I am.

Q Do you have any explanation of why it is more important to

tell the truth here and in your pleading than it was before the Notary Public in 1959?

MR. DULANY: Your Honor, I believe that is argumentative.

THE COURT: I agree.

MR. DULANY: I object.

THE COURT: Objection sustained.

BY MR. SEEGMILLER:

Q I think, Mr. Garfield, that prior to 1959 you had had some other business dealings involving Mr. Benn, is that correct?

A Yes, sir.

Q It has been in the evidence but I want to call it to our attention for the moment. Briefly stated, what was that transaction?

(Tr. 5216)

A Earlier, I believe the year was 1955, Mr. Benn sold to my company a gas property on the Florida Keys in which he represented that all the assets, physical property of this purchase were free and clear, and gave us a full warranty, and then we found out months after the deal was closed that most of the assets were encumbered, all the vehicles had conditional sales contracts against them; and we found that, from one of the managers who wasn't paid by Mr. Benn, after we had taken possession, months later, he finally broke down and said Mr. Benn, the day of the closing of our deal, authorized that particular branch in Tavernier, or in Marathon, rather, to delete all the physical property from that plant and send it down to Key West, where he still owned some gas properties, which he had acquired at a bankruptcy sale.

So he had not only stolen property but he had also misrepresented the true facts about the assets, which developed into a legal battle between us and the ones who held the mortgages and made claim against this property. In

these cases, Mr. Nicholson, St. Clair Nicholson, represented us. It took several years and we finally were successful in retaining the properties. However, we did take a -- I think we lost about \$50,000, approximately, as a result of this transaction.

Q Mr. Garfield, if you think this is important, I don't want to stop you. We have had evidence on this. I (Tr. 5217) merely wanted to identify it for the purpose of the record.

A I am giving you my memory.

Q I suggest that is enough for my present purposes unless there is some reason you want to go forward.

A I am sorry, I may have gone too far.

Q There was litigation in this case?

A Yes, sir.

Q Did you charge Mr. Benn with fraud in that litigation?

A I don't recall exactly what -- whether that was done. As my recollection goes, the suits were against us by the claimants.

Q You defending?

A Who claimed the assets that we had purchased.

Q And you don't know whether Mr. Benn was charged with fraud in that litigation?

A I just really don't know that.

Q It is your view, I take it, from what you just said, that you thought he had misrepresented facts and had stolen some property? I think that is what you just said, is that right?

A Well, we know that he misrepresented because it is certainly evident at this time that he did.

Q Am I correct, in your testimony of just a minute

(Tr. 5218)

ago you stated that you also thought he had stolen some property? Did you say that?

A I indicated that he had property, physical property removed from the branch and sent down to Key West, after the deal was closed, that day or the next day.

Q Now, during the period from about the latter part of February 1959 through to May 26, 1959, did you think at all about this prior difficulty you had had with Mr. Benn?

A Oh, yes; oh, yes. I had not spoken to him and I certainly wouldn't have, and I actually had no use for the man, and this is true.

Q Well, what was it that brought you to have confidence in him enough to do what you said you have done here this morning, that you did everything blindly that he said. What was it that brought you to have that much confidence in him?

A Well, in the last of February or the early part of March, the first of March, I expressed to my wife the fact that I was in a pickle, I felt that I was unable to protect my rights in the Garfield Apartments because Mr. Sankin was here all the time, he had full control of everything, and he had opened a bank account. I couldn't even sign on that account. I couldn't see the reason for it. He had made improper withdrawals of money.

I said: Well, I don't know how I can protect myself

(Tr. 5219) because I am not going to be here. I am in business; I am tied up.

And then she came up with the idea that she said that she knows someone who is so sorry about having misrepresented and causing us so much loss, and that he was a friend, and he was turning over a new leaf, he was becoming conscience stricken because of this bad deal, and she thought he would be willing to help me, to give me advice.

I didn't go to him to negotiate a deal like this or to even plan a sham transaction.

She thought that he could give me advice because he was a man of international business interests and that he had so much experience that he could properly advise me what to do.

I protested this. I said: No, not that man. I said: Never again for me.

And she persisted. She said: Would you mind just talking to him?

And I said: Well, if you insist on it, I will talk to him, but I don't think that he is the man for me.

But it happened. She did arrange the meeting with Mr. Benn and myself on the morning of March the 14th at Mr. Pardo's office.

At the door before we went in, I said: Janet, I (Tr. 5220) think I had better get out of this. Let's go down to the elevator.

We walked over to the elevator. At that moment Mr. Benn and Mr. Pardo walked up; and she said: Well, let's talk to them.

So we turned around and walked in, and we talked to them. And we said to Mr. Benn: We have a little problem of no control over our own stock, and we have reason to believe that we cannot protect ourselves, and we would like to get your advice about what to do.

I had all my files. I had my briefcase. I had all my files with me.

Mr. Benn looked over all the files, saw all the documents, saw the agreements that Mr. Sankin and I had entered into. I didn't have my canceled checks with me then, but I had all the other things; and we discussed it for about an hour, an hour and a half.

He said that he had a firm of lawyers in Washington. He gave the name. And he said they were representing him; and he had to go back to

Washington, he would look into it. He was busy but he would look into it and he would see how he would advise me.

And that was it. We then went to a restaurant with him, where we had lunch, and he left. And I would like to (Tr. 5221) interject at this point that there was no agreement drawn on that day, because we were only together about two hours, and that is all, and there couldn't have been an agreement.

We never went to a Notary. So there was no agreement on March 14. This is the truth.. This is what happened.

Now, after that, I didn't hear from Mr. Benn for three weeks, and I was -- well, I was feeling that perhaps this was best. All of a sudden one day I get a call from him at my office, and he said he had thought the matter over, he had investigated it. He had found, checking into Mr. Sankin's background and his handling of the affairs of the building, that I was justified in my suspicions and, therefore, he would like to advise me further what to do to get my voting rights back to protect myself.

The next day he came to my house. He had with him a document -- well, he had with him tablets and his briefcase. He always has his briefcase. And he took out the tablet and started writing. And he took out from his briefcase several books, and he referred to those books constantly while he was writing.

I said: Well, what are you doing, Jim?

He said: I am working out a plan to protect you, to get you back your rights. Because I feel guilty about how I treated you and your company in regard to your purchase of (Tr. 5222) the Keys properties and also because I think so highly of your wife, and I want to do it for her, and I want to do it to show you that I feel bad about this past dealing that I had -- that you had with me.

He was very convincing, and I felt that with his knowledge that he probably could do something that was in order. I had no intention of getting involved in this, but I did get involved before I knew it, and it just traveled down like a ball rolls. It just went on and on. And, of course, I believe that even during that time while it was going on my wife became somewhat suspicious, even though she was friendly with Mr. Benn, which caused her at various times to tell me not to sign the documents. She said: Well, there are too many papers. I can't understand all these papers.

I said: Well, I don't either. I said: If we trust the man and he is doing something to help us and we are not going to hurt anybody, then let's sign the documents.

And that is exactly what happened.

Q When he explained the plan to you, was it your understanding that you were going to deprive Mr. Sankin of his equal voting rights and get them back for yourself? Was that your understanding?

A I would like to explain that, if you will, Mr. Seegmiller.

(Tr. 5223)

Q By all means.

A The original agreement between Mr. Sankin and I was in my mind more of a moral understanding than it was a legal one, in my mind. I felt deeply about that. I trusted Mr. Sankin implicitly. I had every confidence in him. I tried to give him a hand. I tried to assist him. I tried to have him develop into a sound and good businessman. And I gave him --

Q Now, Mr. Garfield, I doubt that you are explaining or answering the question. I don't want to shut you off.

A I am going to. I will get to the point. Because I trusted him, when he asked me for those rights, those fifty per cent voting rights, I never thought he would take advantage, and I gave it to him.

When that trust and confidence in my mind was destroyed, I felt morally I had a right to my voting rights to protect myself, to say, no, when he drew out money that he shouldn't, to say, no, when he opened an account when he shouldn't have, with only his signature on, to say, no, to anything that he did that I felt was bad or was wrong.

I was going to only try to guide him. I wasn't going to try to hurt him. I was trying to guide him, but I couldn't guide him without my voting rights. And I felt morally I had my rights; and I certainly did it the wrong way.

(Tr. 5224) Q At the time Mr. Benn was explaining to you this plan of operation, you were aware of the agreements of May 1, 1958 that you had signed?

A Oh, yes. So Mr. Benn was, too; he saw them on March 14.

Q You said you had a moral right to have them. Did you feel you had a legal right to those voting rights?

A That is what I came to Mr. Benn for, to find out legally what would be the proper method to get them back.

Q Was it your understanding that this plan he had would be a perfectly legal method?

A Well, he told me it was.

Q Did you believe him?

A I accepted it that way. I did believe him. I know now it wasn't.

Q Why didn't you go present the same to Mr. Sankin then? If you had both a moral and legal right to it, why did you go through all this collateral program? Why didn't you go and present it to Mr. Sankin?

A The reason I didn't go to Mr. Sankin was because there was no use talking to him any more, and I wasn't even speaking to him.

Q Did you think it would be depriving Mr. Sankin of something that he was otherwise entitled to?

(Tr. 5225) A I would deprive him of nothing. I didn't think I was, because voting rights were only -- should have been coincident with the percentage of ownership; and I gave those rights to Mr. Sankin because I trusted him.

Q I believe the plan was that you were to be the owner of 5410. Was that part of the plan?

A The plan that Mr. Benn developed was that.

Q And that you would conceal from Mr. Sankin the fact that you were the owner, was that part of the plan?

A Yes, that is right, correct.

Q So you were going to conceal from Mr. Sankin the essentials of your plan, is that right?

A Yes, sir.

Q And you knew that, didn't you?

A Yes, I did.

Q Did you think that was right?

A No.

Q Did you have any suspicion at all when that thing occurred to you that you were doing something that wasn't right, that maybe here goes this man Benn again. Did you have any suspicion at all?

A No, sir, I did not. I didn't get that suspicion until later.

Q Despite the fact that your wife suggested some
(Tr. 5226) suspicion on some occasion?

A No, no, this was after we had been down the line, ninety per cent down the line. It was quite late then.

Q Well now, when you had a document such as Plaintiff's Exhibit 22, that we talked about a few moments ago, that is the one that has the date of March 14, 1959, and I believe you testified you didn't really know what was in that document -- is that a correct statement of what you testified?

A On March 14?

Q On March 14.

A I knew generally what was in there but I didn't pay too much attention.

Q It didn't matter too much to you, did it?

A It couldn't have.

Q It was just a scheme to get these rights from Mr. Sankin?

A That is right.

Q So it didn't matter much. When you were asked to sign that on a date that wasn't a true date, didn't you get a little suspicious of this man Berm? He had been dishonest with you before.

A No, I didn't. Although I did protest. I said: This isn't the right date.

He said: There are reasons for it. And he said:

(Tr. 5227) You have to leave this to me because I know what I am doing. And I accepted it.

Q You agreed because you thought that was the necessary procedure to getting voting rights away from Sankin, is that right?

A I didn't think about it as a date independent of the whole scheme, no. I didn't think about it that way.

Q How about acknowledging it before a Notary Public?

A Well, this Notary Public --

Q Didn't you get suspicious when you were asked to do that?

A No, because Mr. Benn apparently had been using this Notary Public for several years and he seemed to know what he was doing, and I accepted it.

Q When you sign a document of this caliber, just sign it, what does that represent to you? What does that mean to you when you sign it?

A Today it means I made a mistake.

Q As of now, all right, what does it mean when you sign a document? Does it mean, this is just a lot of nonsense; I don't know what is in it; nothing to it.

Is that what it means, or does it mean that you seriously are subscribing to the things contained in that document? Which does it mean to you?

(Tr. 5228-5234) A In my mind, I will tell you that it means that I signed the document, and it was notarized, and I didn't give it much further thought.

Q It was an essential step?

A Except as for the over-all purpose.

Q The only thing that you were really aware of all these times was the over-all purpose of getting your voting rights?

A That is all. That is all I had in mind. I was blinded about everything else.

THE COURT: Is this a good place to take the luncheon recess?

MR. SEEGMILLER: Very well.

THE COURT: One-forty-five.

(Whereupon at 12:30 p.m., the trial was recessed pursuant to reconvening at 1:45 p.m. of the same day.)

(1:55 o'clock p.m.)

THE COURT: You may proceed.

Thereupon,

JOSEPH A. GARFIELD

resumed the witness stand and testified further as follows:

CROSS EXAMINATION (Resumed)

BY MR. SEEGMILLER:

Q Mr. Garfield, on May 26, 1959 you signed a number of agreements, a pledge agreement, an indemnification agreement, a release; do you remember those agreements?

A Yes, I do.

Q You did sign those agreements on that date?

A Yes, sir.

Q Did you sign those for the purposes expressed in them?

A Yes, I did.

Q You understood what was in those agreements; is that right?

A Yes.

Q And you did sign them for the purposes?

A Yes, sir.

Q Now on May 4th, 1959 I believe you signed some other agreements, one was an exchange agreement, so-called, (Tr. 5236) with Mr. Benn of 5410, do you remember that one?

A Yes, sir.

Q On that same date you signed a receipt for a stock certificate, do you remember that one?

A Yes, sir.

Q And did you have any suspicion at that time that maybe Mr. Benn was not playing fair with you?

A Not at that time.

Q Well when did you first get that suspicion that maybe he wasn't playing fair with you?

A I believe it was on May 6th.

Q And what was it that made you suspicious?

A My uncle, Mr. Mankes, came to my office and pleaded with me, he says, I know you haven't sold anything, but you are hurting Julie, and perhaps you don't know that Mr. Benn has removed \$24,000 of your money from the account, and I said, Yes, I knew that. I told him that I knew that, but actually I didn't.

He told me a few other things that had happened, and that Mr. Sankin had taken \$20,000. That was the first I heard of that. When he left, I immediately called my wife and I said it seems to me that Mr. Benn is now planning to steal money and perhaps he may be on his way to stealing everything that I have in this property.

(Tr. 5237) Q And that was the time you began to be suspicious? .

A Yes, that was the day.

Q And from then on out you had no confidence in him at all; is that right?

A No. Except that I was hoping that perhaps he could give me some explanation. I was suspicious but still wasn't completely convinced that it all couldn't be explained by some -- by proper explanation. And in view of the fact that I actually owned 5410 Connecticut Avenue Corporation, I assumed that he might be doing it to put it into the 5410 Connecticut Avenue Corporation, which was my corporation anyway, but I had to get that explanation. I was worried about it, yes.

Q You felt at that time that you did in fact own the 5410 Connecticut Avenue Corporation?

A Well, I had stock certificates and stock powers and things at that time.

Q You felt the sale had been completed and it had been sold from you individually to the corporation at that time?

A Well not really sold, it was a transference, I would say, of my stock from my personal name to the corporate name, which meant only that it was transferred from one to the other. It never was sold.

(Tr. 5238) Q But you felt the transfer had been completed and the 5410 Connecticut Avenue Corporation was indeed the owner on that occasion?

A Well he told me it was so.

Q And you relied entirely upon his word about it?

A Yes, I did.

Q Mr. Garfield, I would like to show you a document that has been marked Plaintiff's Exhibit 27. I think you testified about that before. And I will ask you if that contains your handwriting on the front of it in whole or in part?

A In whole. This is all my writing.

Q And up in the top left-hand corner there is a word written in there, exchange. That is your writing too?

A Yes, sir, it is.

Q Why did you put that on?

A Mr. Benn said I should put it on.

Q You didn't ask him any questions about it?

A No, not a question, because I was following his instructions throughout.

Q Now on the reverse there is written this: By the endorsement hereof the payor acknowledges receipt of \$1000 in cash in exchange for this check

And you were the payor on that check, were you not?

(Tr. 5239)

A I was the maker of the check, yes, sir.

Q And under that appears your signature, does it not?

A Yes, sir, it does.

Q Did you read that before you put your signature on the reverse side?

A Yes, sir, I did.

Q Was that true?

A No, sir, it wasn't true. I never got a penny from Mr. Benn. He put it on there for the primary purpose, as he told me, to show that no money had passed between us, so that no one could attack the bona fides of the ownership of the 5410 Connecticut Avenue Corporation, and he actually was representing to me it was only to protect me, and that this is the way it would have to be to protect the bona fides of the supposed transaction between us.

Q Now he said that this was to show that no money had passed between you?

A No. He wanted to show that I hadn't given him any money and that he had actually paid me cash for this check.

Q But it is your testimony that he didn't pay you the cash?

A No, he did not.

Q But you signed that nevertheless?

A Yes, sir, just like I signed the other documents.

(Tr. 5240)

Q Mr. Garfield, I would like to read to you another few sentences from Exhibit No. 22, and we identified that this morning, you did, as the stock purchase agreement dated March 14th, but which you said was in effect

executed on April 6th. You understand what that agreement was, do you?

A Yes, sir.

Q I would like to read paragraph 4(b). This is what it says:

"In addition to the above 165 units as referred to herein, the seller represents that an additional asset in the form of \$60,000 in cash is presently in a bank account or shall be delivered to an agreed bank account in favor of Garfield and Sankin, Inc., and the said \$60,000 referred to herein is an asset of the said corporation and shall be and remain an asset of said corporation, and shall not be withdrawn, directly or indirectly, from said corporation by the seller or purchaser or by anyone acting in their behalf, and shall be on deposit through the day of the closing of this transaction.

"It is understood and agreed by all of the parties hereto that said \$60,000 bank deposit is to come from the proceeds of the permanent FHA mortgage financing, and in the event said permanent mortgage has not been closed or in the event there are not sufficient proceeds after payment of all other obligations of the corporation to make the said \$60,000 deposit, the seller shall contribute to the corporation as a capital contribution, any deficiency between the proceeds available for said deposit and \$60,000, and provided further that in the event this transaction shall be closed prior to the closing of the permanent mortgage, the seller shall lend the corporation \$60,000. . ."

(Tr. 5241)

Were you aware that that provision was in that agreement when you signed it?

A Truthfully, no. I didn't pay much attention to that. I can explain it though by telling you that all the facts and recitations in those

various agreements were developed by Mr. Benn, and in the original I may have questioned a few things, but he said, Don't worry about these things. He said, These clauses and these recitations are only in here to make the transaction look legitimate, and that so long as you own the corporation you don't have to worry about these agreements. These will be washed out in the end anyway.

Q There was no concern to you that you positively represented there would be \$60,000, and if there wasn't, you (Tr. 5242) would pay it yourself?

A This was to the 5410 Corporation, and if I owned it, it meant nothing.

Q Do you recall one of the notes given on that date with this instrument was a \$60,000-note?

A It was a \$540,000 and \$60,000.

Q And was that \$60,000 note related to this provision that I just read so far as you knew?

A So far as I know, the notes were planned by Mr. Benn to show a total purchase price of \$600,000.

Q Did you have any understanding at all as to why there were two notes instead of just one?

A No, sir, I did not.

Q You didn't ask any question about that?

A I didn't inquire into it, no, sir.

Q I would like to read you a little material from Plaintiff's Exhibit No. 25, Mr. Garfield. We had this before you this morning, and for your information it is a stock purchase agreement executed on April 21st, 1959, with respect to Julius Sankin, Inc. stock; do you remember that agreement?

A Yes, sir.

Q Do you know what I am talking about? I would like to read to you from paragraph 2(b) of that document:

(Tr. 5243)

"Seller warrants and represents to the purchaser that the said \$200,000 demand note, which said note represents the purchase price of the said sixty-six and two-thirds shares of the authorized, issued and outstanding common voting stock, shall be held in escrow by a mutually agreed escrow agent and that the said \$200,000 herein referred to shall represent ninety per cent of the seller's equity in and to the assets of the said Julius Sankin, Inc., that is, that the seller's equity in and to Julius Sankin, Inc., represented by sixty-six and two-thirds per cent of all of the authorized, issued and outstanding corporate capital common voting stock of Julius Sankin, Inc., shall have a dollar value of not less than \$223,000..."

Were you aware that that provision was in that agreement when you signed it?

A Mr. Benn at the time -- well, he decided it would be best to protect me further by including the Julius Sankin Corporation. I indicated to him we would duplicate in general the same arrangement we accomplished by the original escrow of the Garfield and Sankin stock. I didn't pay too much attention what went into it. As a matter of (Tr. 5244) fact, the formula that he developed, I didn't understand it anyway.

Q Did you think your equity in Julius Sankin, Inc. was short \$223,000?

A No, I did not. I knew Julius Sankin, Inc. was a corporation designed for one specific purpose, that is, to construct the building, and at the end of its time its assets, whatever it may be worth, would be merged into Garfield and Sankin, Inc., which would be the only surviving or remaining corporation.

Q Did you think Julius Sankin, Inc. owed you any money by way of money loans at that time?

A It did not. As a matter of fact, the only reason Mr. Benn decided that he would better protect me was because funds for the construction were going through that account at the time, and there was a considerable sum of money. He said, Don't you think perhaps Mr. Sankin might latch on to those funds? Don't you think you need protection there too? I said, I don't know. I think perhaps it might be advisable to protect me, if you feel it is necessary. He says, I do, and I think what we better do is do the same thing, develop an escrow agreement the same as we did before on that corporation, so you will have full protection all the way down the line.

PORTIONS OF TESTIMONY OF MRS. JANET GARFIELD

Tr. 758

BY MR. GENN:

Thru

Tr. 768)

Q Now, would you tell us the topics of conversation and the substance of what was said at that meeting or discussion, rather, in the plane, in February, 1959?

A (MRS. GARFIELD) Mr. Garfield said to me that he was very unhappy the way things were going with the Garfield Apartment Building. He said that he felt he no longer had control of what belonged to him. He said that he didn't feel that Mr. Sankin was consulting him enough and he felt that he was taking too much advantage -- that he wasn't consulting him enough.

Q Now, did you make any suggestions at that time? Did you make any suggestions at that time as to what Mr. Garfield should do?

A Well, at that time -- up until that time, I didn't know that Mr. Sankin had equal voting rights, that Mr. Garfield had given Mr. Sankin equal voting rights and I was very much surprised to find this out.

Q What did you --

A I said there must be a way to overcome this. Certainly you have the larger part of the money in this corporation and you certainly -- there must certainly be a legal way to overcome this and I therefore suggested that he consult Mr. Benn.

Q Now, by Mr. Benn you mean Mr. James T. Benn, the defendant?

A Yes, I do.

Q Did you know Mr. James T. Benn prior to this conversation in February of 1959?

A Yes, I did.

Q Mrs. Garfield, what was your relationship with Mr. Benn at that time?

A It was an intimate relationship.

Q There has to be a record made, I am sorry to say, Mrs. Garfield. Would you describe or state what you mean by an intimate relationship?

A Well, the best terms that I can put it in, an intimate relationship, would be an amour.

Q For how long had this relationship been existing prior to February of 1958 with Mr. Benn?

A For some years.

MR. DULANEY: '59.

BY MR. GENN:

Q I am sorry. Prior to February of '59. This was prior to February of '59?

A Yes.

Q At the time of the discussion in the airplane that you have described?

A Yes.

THE COURT: Had this relationship been continuing up to February of 1959?

THE WITNESS: Yes, sir.

MR. BECK: Your Honor, I beg your pardon. I didn't hear her answer as to when it commenced.

THE COURT: Several years prior to 1959. For how many years prior to 1959?

THE WITNESS: I would say three years.

THE COURT: Three?

THE WITNESS: Yes, sir.

BY MR. GENN:

Q Now, with reference to Mr. Benn and the date of February 1959 in this airplane trip, when had you just prior to that trip last seen Mr. Benn?

A I had seen him just a few days before we came to Washington.

Q Now, had there ever been a discussion if any with Mr. Benn prior to that trip about the property known as 5410 Connecticut Avenue, the Garfield Apartments, before that time?

A Yes.

Q And you had had such a discussion with him?

A Yes.

Q Would you state what Mr. Benn said, if anything, about those apartments or what he desired, if anything?

A Well, Mr. Benn knew when I came to Washington and he was always interested in supposedly what I was doing and what my husband was doing and he always asked me how things were going with the Garfield apartment building and he told me that he had been to Washington and looked at the property and thought it was a very nice project.

Q Was there any discussion as to whether or not he would be interested in engaging upon that project or get into it?

A Yes. He asked me on several occasions to get him involved with Joe, to get him interested with Joe so he could get interested in this project, get interested in this apartment building and anything else that my husband was doing.

Q Now, Mrs. Garfield, you have indicated something with reference to your relationship with Mr. Benn. Had there been any discussions between you

prior to February of 1959 as to whether or not you would marry each other?

A Yes.

Q What were the substance of those discussions?

A Mr. Benn and I were going to be married. We talked about being married after he settled his income tax case which he hoped to settle in July of 1959.

Q Now, these discussions took place and all took place prior to the airplane trip in February of 1959, is that correct?

A Yes, it is.

Q Now, thereafter, after this trip, was there -- did you engage upon any effort to contact Mr. Benn?

A Yes. My husband reluctantly agreed that I should call Mr. Benn -- that I call Mr. Benn and consult him in regard to this conversation we had had.

Q Incidentally, your husband had had some prior business dealings with Mr. Benn, had he not?

A Yes, he had.

THE COURT: Did your husband know of this relationship you had with Mr. Benn for some three years prior?

THE WITNESS: No, sir.

THE COURT: In February of 1959 he was not aware of it?

THE WITNESS: No, he was not.

BY MR. GENN:

Q Now, your husband had had prior business relationships with Mr. Benn, had he not?

A Yes, he had. That is the way I met him.

Q Then did you make contact with Mr. Benn as a result of your conversation with your husband?

A Yes. I called his attorney -- his attorney's office and I left he should call me.

Q His attorney's office, did you say?

A Yes.

Q You called his attorney's office. Whose office would that be?

A Either Mr. Pardo or Mr. Roman.

THE COURT: Were they in the same office?

THE WITNESS: No, sir.

MY LYMAN: I object to that, Your Honor. Just hearsay. He hasn't shown that Mr. Pardo represents him, hasn't shown whatever the other one was represents him -- Mr. Benn. This is a conversation that is clearly hearsay.

THE COURT: Overruled.

A Well, Mr. Garfield told Mr. Benn about his business dealings in Washington in regard to the Garfield apartment building and how he had become unhappy with his association with his equal voting right and he wanted to consult Mr. Benn as a legal opinion for overcoming this about voting -- this equal voting right.

Q Mr. Benn was not an attorney, was he?

A No, but he professed to know the law.

Q Did such discussion take place about legal issues?

A Yes.

MR. LYMAN: I am going to object unless she knows what a legal issue is. She hasn't qualified --

THE COURT: I think you better be more definite.

MR. GENN: Yes.

THE COURT: We will have all laymen practicing law here before long.

BY MR. GENN:

Q Can you state with more particularity what was stated at that meeting with reference to legal questions as you understood them to be?

A Well, I only understood that Mr. Benn said that he would devise a method to overcome this equal voting right, that he would come up with some method to overcome it.

Q So in other words --

MR. LYMAN: Just a minute now. I am having a little difficulty with that microphone.

THE COURT: You just bring your chair up a little closer. I think, counsel, it would be very helpful to this witness if you all brought them a little closer.

MR. LYMAN: May we have the last answer.

THE COURT: It will be read as soon as everybody gets arranged here.

(Whereupon the following was read by the reporter:)

A Well, I only understood that Mr. Benn said that he would devise a method to overcome this equal voting right, that he would come up with some method to overcome it.

BY MR. GENN:

Q Now, then, did you have a further meeting after the March 14 meeting that you have just described?

A Yes, we did.

Q Where was that?

A That was at my home on -- on or about April 4.

Q Incidentally, I am not confident that for the record your home has been stated. Would you state what that address is?

A The address of my home is 6510 Granada Boulevard, Coral Gables.

THE COURT: Coral Gables, Florida?

THE WITNESS: Yes, sir.

BY MR. GENN:

Q Who was present at that meeting on April 4 or thereabouts?

A Mr. Garfield, Mr. Benn and myself.

Q Would you state what the general subjects or topics of conversation were at that meeting?

A Well, Mr. Benn said that he had been to Washington and he obviously had. He had all the brochures on the Garfield and he had some -- what he called negotiable instrument laws and some books and what he called the D. C. corporate law and he was showing my husband the books and making up a plan by which he could make a straw party.

They talked about the arrangement by which they would make it. My husband showed him all of his papers.

Q For how long did -- approximately how long did this meeting take place on April 4?

A For hours.

Q Can you state with some more particularity some of the other matters that were discussed at that meeting?

A Yes, they discussed the value of the property and just how they

- were going to handle the value and how they were going to boost the price up
Tr. 768) so that Mr. Sankin couldn't approach the price.

Q Were there any other matters which at this time you recall that would
- be particular as to what occurred at that meeting?

A No. The meeting was continued the next day.

* * * *

Tr. 773

BY MR. GENN:

thru

Tr. 780)

Q Now, the next day would be April 5, or thereabouts.

A Yes.

Q Now, on that date could you state where the meeting was held?

A At my home.

Q Who was present?

A Mr. Garfield, Mr. Benn, and myself.

Q Now, could you state also in general the topic of discussion at
that particular meeting?

A Yes, they were making -- at least Mr. Benn was making up all sorts
of papers. He was writing it out in longhand, the method by which my husband
would make a stock purchase agreement, whereby he would transfer his stock
in Garfield - Sankin to Joe Hardy.

THE COURT: Mrs. Garfield, you have mentioned these two meetings
on April 4 and April 5 were at your home.

THE WITNESS: Yes.

THE COURT: Did your husband, Mr. Garfield, live there with you?

THE WITNESS: This is our home.

THE COURT: I see. Thank you very much.

Q Now, would you tell us was there a further meeting thereafter?

A The next day.

Q Would you tell us where that meeting was held and who was present?

A That meeting was held at a public stenographer's office in the Columbus Hotel. The stenographer's office as was Mrs. Downey.

Q Who was present?

A Mrs. Downey, Mr. Benn, Mr. Garfield and myself.

Q Would you tell us what transpired at that meeting in the Columbus Hotel on April 8, 1959?

MR. LYMAN: April 6th.

Q April 6. I am sorry.

A They drew up this stock purchase agreement. Mr. Benn dictated it to the stenographer and they drew it up right there.

THE COURT: Was this Columbus Hotel in Coral Gables, also?

THE WITNESS: No, sir. It was in downtown Miami.

MR. GENN: Can we have this marked for identification?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 22, for identification.

MR. GENN: I am going to try to move this along with a further question.

BY MR. GENN:

Q Do you recall any specific documents or what documents were prepared on that day; the names of those documents?

A The names of the documents?

Q Yes, if more than one.

A I only remember that stock purchase agreement dated March 14.

MR. DULANY: That is Defendant Benn's Exhibit No. 2, for identification.

May it please the Court, I believe that has already been identified as Defendant Benn's Exhibit 2, for identification. I think we are running into duplication again.

THE COURT: See if we can avoid that. Is that Benn's No. 2, for identification?

MR. LYMAN: Yes, sir. If the plaintiff wants to adopt it I have no objection.

MR. GENN: May I see that a moment. This purports to be an original rather than a photostat.

THE COURT: Do you prefer the original?

MR. LYMAN: No, there is a difference, Your Honor.

MR. GENN: There seems to be some small difference.

MR. LYMAN: The original is deficient.

MR. PARDO: Oh, the original is deficient.

THE COURT: What do you have now?

MR. GENN: I have the original.

THE COURT: Identify it as Plaintiff's Exhibit 22, for identification.

(Stock purchase agreement dated
March 14, 1959, was marked Plaintiff's
Exhibit No. 22, for identification.)

BY MR. GENN:

Q Mrs. Garfield, I show you what purports to be a stock purchase agreement dated March 14, 1959, and ask you if that is the document you have just referred to as the one which was prepared on April 6th? (Showing.)

A Yes. This is the document.

MR. GENN: I think we will put this in evidence, Your Honor.

THE COURT: Any objection, gentlemen?

MR. LYMAN: No objection.

THE COURT: No objection?

(Counsel indicated there was no objection.)

THE COURT: It will be received.

(Stock purchase agreement,
heretofore marked Plaintiff's
Exhibit No. 22, for identification,
was received in evidence.)

THE COURT: I would like to take a look at it. Is this an exhibit to a complaint or something.

MR. DULANY: Yes, sir.

THE COURT: I have read it. It is received in evidence. I thought it sounded familiar.

BY MR. GENN:

Q Mrs. Garfield, Plaintiff's Exhibit No. 22, which has just been referred to as the stock purchase agreement, appears to bear the date March 14, instead of the date you stated it was executed. Was there any discussion about --

MR. LYMAN: Just a moment. Your Honor, I don't recall her saying anything about anything executed.

THE COURT: Yes, she did. She said the meeting was April 6, and she said in identifying this document it was dated March 14.

MR. LYMAN: I stand corrected.

BY MR. GENN:

Q Was there any discussion about the fact that this document was dated March 14, rather than the day on which you stated it was executed?

A Only between my husband and myself. We wondered why it was dated March 14. Mr. Benn didn't tell us why; we were just following instructions.

Q Did you hear any instructions to that effect from Mr. Benn?

A No.

Q Now, after this agreement, Plaintiff's Exhibit 22, was signed, when was the next meeting?

A Well, we continued from Miss Downey's office, right down to the airline ticket office where we found out that Mr. Benn had made reservations for the three of us to come to Washington that night. And we came --

Q And that night would be, and we are now at the point of April 6?

A That's right.

Q What happened next?

A The next day we met at Mr. Saunder's office.

Q Now, Mr. Saunders is in Washington, D. C., and he is the attorney who has been referred to in previous testimony; is that correct?

A That's right. Mr. Benn's attorney.

Q Now, at that time were any documents of any kind signed?

A They were busy making papers all day. Mr. Benn requested a Mr. Holloway, one of the members of the firm, to call a man over from, I think what is called the CT Corporation. to draw up the corporation. They talked about this half a day.

Q Who is "they"?

A Mr. Benn and the man that came over from the CT Corporation. It seems Mr. Benn wanted a lot of things --

Q Mrs. Garfield, would you be good enough to state what was said, if you recall it?

A I am only saying that he disagreed with the man; that he couldn't get the corporation that he wanted; and it, therefore, took a longer time to draw it up.

Q Were you present in that conversation, or did you hear some portion of it?

A I was present all the time but my husband and I were told to keep quiet by Mr. Benn.

Q And this would have been on April 7; is that correct?

A Yes.

Q Now, do you have any knowledge as to who drafted the papers that you have been referring to as being prepared on that date?

A Mr. Benn --

MR. LYMAN: Objection, Your Honor. He has had everybody in the room. He said up to this point he is in a law office and five or six people are handling papers and now he is asking her a leading question and we object to it as to who drafted it.

THE COURT: I think the thought was: Did she know who drafted the papers? Is that correct?

Read me the question.

(The reporter read the last question propounded to the witness.)

THE COURT: How would he ask that in a less leading way?

MR. LYMAN: Your Honor, I had a picture of a whole crowd here. Very well.

THE COURT: That's what he is trying to find out: Who out of the crowd drafted it.

MR. GENN: I believe the witness has answered.

THE COURT: I didn't hear it.

MR. LYMAN: I didn't hear it.

BY MR. GENN:

Q Will you answer again, please?

A Mr. Benn, I believe, drew those papers up.

Q Were you present at the time?

A Yes.

THE COURT: Mr. Benn drafted the papers in the lawyer's office?

A Yes, sir.

Q Now, do you recall when next, when next any documents were signed or executed?

A The very same day they proceeded to draw up papers for an escrow agreement whereby Mr. Benn would give Mr. Garfield --

Q Don't tell us what it was to say; --

MR. LYMAN: Objection.

Q (Continuing.) Just simply there was an escrow agreement or paper denominated as escrow agreement?

A There was an escrow agreement drawn.

Q When was it executed to your knowledge?

A It was completed and executed the next day.

Q All right. That would be April 8; is that correct?

A Yes.

Q Were any other papers executed on April 8?

r. 781) A There were so many papers but there was none other that I could specifically remember.

* * * *

Tr. 786) THE COURT: To the best of your recollection you tell exactly what Benn said and what Garfield said.

THE WITNESS: (MRS. GARFIELD) Mr. Benn said that we were very lucky that we had turned over to him these papers to make this agreement, to straighten out this equal voting right, because he had investigated Mr. Sankin's reputation, which was not good.

BY MR. GENN:

Q That's what Mr. Benn said.

A That's what Mr. Benn said.

Q And when was the next meeting?

A The next day.

Q And what transpired or what was said at that meeting?

A He came back to our home and he just continuously said how lucky we were and how everything was working out.

MR. LYMAN: Objection, Your Honor. She is just drawing conclusions. We want conversations. I believe the Court did admonish her to testify what she said and what was said in reply.

THE COURT: You have got to, to the best of your recollection, tell what was said and the words spoken.

Tr. 787) THE WITNESS: Mr. Garfield said to Mr. Benn, "Jimmy, I've got to pay you something. You've got to let me pay you for this favor. I can't accept this favor from you."

And Mr. Benn said, "Oh, Joe," he said, "I just want to make up to you for the Keys deal; for that bad deal you got in the Keys." And he said he was happy to get him out of this predicament.

* * * *

Tr. 798)

BY MR. GENN:

Q Now, will you tell us how you have personal knowledge of that check?
Plaintiff's Exhibit 27.

A (MRS. GARFIELD) In Mr. Saunder's office Mr. Benn said to Mr. Garfield,
"Joe, give me a thousand dollars to put some money in this corporation. We
have to make it look like it has something."

He said, "Give me a thousand dollars in cash."

Mr. Garfield said, "Jimmy, I don't carry cash. I can only give you
a check."

He starts to make out a check to James Benn and 5410 Corporation.

Q Were you present at that conversation?

A Yes, sir.

Q Was anyone else present beside yourself, Mr. Benn, and Mr. Garfield?

A I can't say specifically. Mr. Holloway and Mr. Saunders were in and
out of the office all the time.

* * * *

Tr. 880

BY MR. SEEGMILLER:

thru

Tr. 885-B)

Q Now, going back to the months of March and April and May, 1959,
did you have any physical or mental disability that affected your ability
to hear and understand at that time?

A (MRS. GARFIELD) None.

Q Now I think you said, or you did say, that you had a relationship
with Mr. Benn from the time about 1956 to 1959 which you describe as intimate,
was that right?

A Yes

Q And you said that you had planned to marry him, was that right?

A Yes.

Q Now, that was real serious on your part, you really intended to marry him at that time at least, did you not?

A Yes.

Q You were in love with him?

A Yes.

Q Did you think he was honest?

A Yes.

Q And you thought he was dependable?

A I suppose I must have thought so; yes.

Q And I believe you said you saw him frequently, sometimes every day during that period of time?

A That's right.

Q Now, during all this period of time you were living with your husband, is that right?

A Yes.

Q Did your husband suspect that you had, so far as you know, that you had this relationship with Mr. Benn?

A Not that I know of.

Q So far as you know did you give him any reason that he might have suspected that?

A No.

Q Your life with your husband continued in a normal marital relationship during all of those three years?

A Yes.

Q Did you think that was fair to your husband?

A No.

Q So you were doing a thing that you thought was unfair during all of that time?

A That's right.

Q Now as of March and April, 1959, as a matter of your personal affections you preferred Mr. Benn, is that right?

A Yes.

Q Was the same true with respect to business interests, and let me put it this way -- in a business contest between Mr. Benn and your husband, which one would you have preferred at that time?

A I really don't understand what you mean.

Q At that time, in March and April of 1959, if Mr. Benn and your husband were in a competitive business deal, which one would you rather have seen win?

A I would have preferred that there was honesty on behalf of both parties.

Q I am assuming honesty. Did you have a preference in business matters as between them?

A No.

Q I believe you told us in answer to a question by the Court that this relationship between you and Mr. Benn terminated on May 11, 1959, is that right?

A Yes.

Q And had you continued up to that date to love the man and believe

that you were going to marry him up to that date? Is that what you mean?

A Yes, I had.

Q You had?

When did he tell you that he had married another woman?

A He told me that he was going to marry her even before he married her.

Q And then did he tell you he had in fact married her?

A Yes, he did.

Q And did he tell you the reason that he married her?

A Yes.

Q And what was that reason?

A He told me that he was advised by his counsel, Mr. Rolland and Mr. Saunders that he should marry Miss Margaret Bland in order to keep her from testifying against him in his Internal Revenue case.

Q Didn't that shock you just a little bit about his honesty?

A Mr. Benn -- I have to answer that yes.

Q So at that time you did have some little qualms about his honesty, would that be right to say that?

A Yes.

Q Did you think that was a fair thing to do on his part?

A I was guided by what Mr. Benn told me and by what he --

Q (Interposing) I am asking you what he told you. He told you he was going to marry the woman for this particular purpose?

A Yes.

Q Assuming that was true, did you think that was a fair thing for him to do?

A I don't know whether or not I thought it was a fair thing to do.

I relied on what he told me.

Q Well, what did he tell you other than what you have already said?

A He told me it was something he had to do.

Q Did you have any judgment as to whether it was fair or unfair for him to do that?

A No.

Q What information, if any, did you have at any time during this three-year period about Mr. Benn's earlier deal with Mr. Garfield, which I think was referred to as the Keys Deal?

A The only information that I had was that my husband told me that Mr. Benn misrepresented some of the property that he sold to him.

Q Did you believe your husband was telling you the truth when he told you that?

A I had no reason to doubt it.

Q And did he tell you that before or after this period of intimacy commenced between you and Mr. Benn?

A Before.

Q Did that shake your confidence in Mr. Benn just a little?

A No.

Q Did you believe, or you believed your husband that Mr. Benn had taken advantage of him?

A Yes, I did.

Q And you still had confidence in Mr. Benn?

A I certainly did.

Q Now, you mentioned a discussion between you and your husband on an airplane en route to New York City. I believe it was March the 14th. I'm

not sure. Was that the date?

A No, that was not the date.

Q Well, will you fix the date again for the purpose of the next question.

A It was in late February.

Q Late February?

A Late February.

Q And on that occasion you discussed the matter of the voting rights in the two corporations, Julius Sankin, Inc. and Garfield-Sankin, Inc., with your husband, I think you said.

What did your husband say exactly about that relationship between him and Mr. Sankin and these voting rights? Can you remember, just exactly as you can tell it, please?

A He merely said that he was unhappy, that Mr. Sankin seemed to be running the show, that he was not consulting him, and he felt that he no longer had control of what belonged to him.

Q Well, did he feel that he ever had control.

MR. DULANY: I object, Your Honor, as to what he felt. What he said may be admissible.

MR. SEEGMILLER: I beg your pardon, Mr. Dulany. I will withdraw the question.

BY MR. SEEGMILLER:

Q Did he say that he felt he ever had control?

A I don't know that he expressed it like that, in those particular terms.

Q I believe you said that during that conversation you considered with your husband the possibilities of changing that situation about which he was unhappy, was that so?

A Yes.

Q Did you consider the possibility of going forthrightly to Mr. Sankin and discussing it with him open and above board?

A No.

Q Don't you think that would have been a good thing to do?

A I don't believe that judgment would have been left up to me.

Q But at least it wasn't mentioned by either you or your husband, was it?

A No.

Q Now, I think you suggested that you contact Mr. Benn about that, is that right?

A Yes.

Q And did you say also that you suggested that you would get a way to do this legally, was that correct? Am I quoting you correctly on that?

A I said to Mr. Garfield, "Mr. Benn professes to know all of the legal technicalities because he says he does business all over the world." So therefore I suggested that Mr. Benn would know about it.

Q Well, did you have in mind at that time that Mr. Benn would show you a way to do this legally?

A Yes.

* * * *

PORTIONS OF TESTIMONY OF DEFENDANT JAMES T. BENN

Tr. 4929-
(4938)

Whereupon,

JAMES T. BENN

called as an adverse witness by the defendants Garfield, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DULANY:

Q Mr. Benn, you purchased the Surinam American Timber Company stock from a Mr. Harris?

A That could be, yes but it's a qualified "yes" because the Surinam American Timber Corporation is the Anglicized version of the Dutch corporation.

Q I am perfectly happy to agree with you, Mr. Benn, when we refer to the Surinam American Timber Corporation, it will also include its Dutch name predecessor which I can't pronounce either.

A Thank you, Mr. Dulany.

Q Did you purchase that from Mr. Harris?

A Yes.

Q What did you pay him for it?

A A total of \$15,000 plus \$125.00 a week for a period of several months.

Q Would you say a total of approximately \$16,000 would be approximately correct?

A Oh, I would say, making several trips to Surinam and incurring all expenses, I would say that that would be a little bit low.

Q What would you say then? You name it.

A I think that Mr. Harris cost me approximately \$20,000, or better.

Q And you owned then, in late September and early October, 1958, 2,000 shares of this Surinam American Timber Company?

A I owned as of May 5, 1958 the total issued and outstanding corporate stock of Surinam American Timber Corporation.

Q Two thousand shares?

A Whatever the shares are, yes. The 2,000 shares, sir, I purchased from Mr. Joe Harris 99-1/2 per cent of the stock and I purchased the other 1/2 per cent from a J. Christian Curiel, former Economic Minister of the Surinam government.

Q What did you pay for that?

A Oh, approximately \$1,000 and that was in payment for his services as an accountant because he was only there in a nominative capacity and had received his shares on that basis.

Q Well, did you pay him \$1,000 for his services or for the stock?

A Well, I don't think I could have gotten --

MR. BECK: Let me object, please.

THE WITNESS: I am sorry.

MR. BECK: I object, Your Honor. This is beyond the issues of the intervenors.

MR. DULANY: May it please the Court, I can tie this up if we can ever keep it moving. I am doing my best. I am going to ask the Court's indulgence to let me go ahead.

THE COURT: I will hear it and you can move to strike if he doesn't tie it up. Restate your question.

BY MR. DULANY:

Q Did you pay him \$1,000 for his services or did you pay him \$1,000 for his 1/2 per cent stock interest?

A Well, Mr. Dulany, sir, there was an indebtedness to him and I don't think I could have acquired or gotten a hold or had him sign a stock power assignment without paying him, so I guess in my own mind, I did both.

THE COURT: Why don't you answer the question?

THE WITNESS: I don't know, sir.

THE COURT: You don't know what you paid him for?

THE WITNESS: I got the stock but he wouldn't give the stock unless I paid for his services.

THE COURT: In other words, the services were more valuable; is that what you are saying?

THE WITNESS: I would say that the services at that time to him was much less than the value of the stock.

THE COURT: What you have said is absolutely nothing, Mr. Benn.

THE WITNESS: Well, I will try to do it over again.

THE COURT: Yes, and this time put your mind to it.

THE WITNESS: Yes.

THE COURT: What is the answer?

THE WITNESS: Mr. Curiel is a CPA. He had done work for Mr. Harris and/or this Surinamese corporation. He had received stock from Mr. Harris without paying for it and, since I wanted all of the stock, he said, "I am owed money" and he said, "I did not pay for it." He said, "I would like to hold it."

I told him I would make rearrangements with him later if we could all agree, but I told him I wanted 100 per cent of the corporate stock in order for me to do some changes.

He said, "I will deliver that to you with that understanding" -- that I may get this half share, have 1/2 per cent back -- but he said, "I want my \$1,000 for my services."

THE COURT: What you are talking about is what Harris owed him for his CPA services?

THE WITNESS: Well, it was approximately a thousand but then Harris had him do some more work and then I asked him also to check with the various ministries because he was acquainted with all of them, and it amounted to a thousand dollars.

BY MR. DULANY:

Q Mr. Benn, do you recall your deposition being taken on March 2, 1961?

A Yes.

Q Referring to page 601, do you recall making a statement, Mr. Benn, "Mr. Harris further contacted me and sold the transaction to me for \$15,000, and that's the sum total of it"?

A Oh, yes, insofar as the total moneys I paid him with reference to the stock, but you asked me if that is all it cost me or I inferred that you asked me and it cost additional, transportation, several trips to Surinam, other indebtedness that he had left there; plus over and above that, you did not inquire at that time -- or whomsoever interrogated me did not inquire into the remaining moneys that I paid him over and above that.

MR. BECK: Your Honor, I object. This is all hearsay as to the intervenors. Could I reserve an objection and move to strike if it is not tied up?

THE COURT: At the proper time. He says he is going to tie it up a little bit later.

BY MR. DULANY:

Q Now, Mr. Benn, in October of 1958, there came a time, did there not, when you sold your 2,000 shares of Surinam American?

A On October 24, 1958 --

Q I think you can answer that very simply, almost yes or no.

A No, because I can't -- You said October and I would like to get it specific.

THE COURT: When did you sell the shares?

THE WITNESS: October 24, 1958. It's not October; it's October 24. It is important that it be 24, because I would have never sold them had there not been a temporary assessment on --

THE COURT: You are not asked why you sold them; you are asked when you sold them. October 24, 1958.

THE WITNESS: Thank you.

BY MR. DULANY:

Q This at that time, then, was all the issued and outstanding stock of the corporation, the two thousand shares?

A At that time.

Q At that time. And you sold them to a Cuban syndicate headed up by Dr. Klawnas?

A No. I sold it to Orion Realty Company, who was headed up by Dr. Klawnas.

Q Is that a corporation?

A That's a Panamanian corporation.

Q And Mr. Link represented Orion and Klawnas?

A No, Mr. Link represented Mr. Klawnas in the United States on all matters.

Q And Mr. Klawnas was representing Orion?

A Thank you. That's the way I understood it. There could have been an intermingling. I don't want to get too specific with it, but that's the way I understood it then.

Q Now, what did you sell those 2,000 shares for?

A For \$20,000.

Q And you reserved something?

A Yes.

Q What did you reserve?

A We reserved 50 per cent not only of the issued and outstanding stock but also 50 per cent of the remaining authorized stock.

Q Now, did you reserve the stock or did you reserve the right to repurchase that stock?

A We took an option to buy.

Q And how long was that option for?

A Three years.

Q At what price was that option exercisable?

A I had agreed that I could buy one-half of it for \$10,000.

Q In other words, you could buy half of whatever then was issued and outstanding in the Surinam American for \$10,000?

A Yes, sir.

Q All right. Now, did you on the same day transfer that option to another company?

A Yes.

Q What company?

A International Timber Corporation.

Q And who owned that?

A I.

Q All of it?

A All of it. The stock had not been issued at that time, but I formed it on July, 1958.

Q Did you subsequently have stock issued to you by that company?

A International Timber Corporation issued to me all of its stock.

Q Which was 2,000 shares.

A Two thousand shares of bearer stock, bearing date of May 4th, 1959.

Q It was on May 4th that you had this issued?

A Issued, yes.

Q But the assignment to the International Timber Corporation was in October -- You can give me the date again.

A The same date.

Q What is that?

A October the 24th.

Q And the same day, it was assigned to International Timber?

A It was a concurrent transaction.

Q Now, where did these concurrent transactions occur physically?

A Physically, in the offices of A. M. Kidder and Company, 139 East Flagler (sic) Street in Miami, Florida.

Q In Miami, Florida?

A In Miami, Florida, yes.

Q And in Mr. Link's office?

A Yes. Mr. Link had three offices in Florida that I know of

* * *

Tr. 4562-
4568)

THE WITNESS: (MR. BENN) [It had] enough cash to meet all current obligations and demands upon 5410 Connecticut Avenue Corporation.

BY MR. GENN:

Q Approximately how much?

A In cash?

Q Yes.

A At least \$120,000.00

Q It had \$120,000.00?

A At least.

Q And that was in your briefcase; isn't that right, Mr. Benn?

A When?

Q At the time that we're speaking of.

A No.

Q Where was the \$120,000.00?

A I had it hidden.

Q You what?

A I had it put away.

Q Tell us where you had it put away?

MR. SEEGMILLER: I object. I don't think it's relevant. He had it. Where it was exactly, I don't think is relevant to any issue in the case.

THE COURT: Overruled.

THE WITNESS: I had it hidden in Mr. Saunders' air conditioning room.

BY MR. GENN:

Q You --

A That's the truth. He saw me take it down. Wanted to know what I was doing when I was taking it down.

Q The \$120,000.00 you had hidden in Mr. Saunders' air conditioning room?

A Yes.

Q Is that right?

A Yes, sir.

Q On what date did you put it in there?

A Oh, sir, let me see, please, sir.

(There was a short pause.)

A Oh, two or three months, a couple of months previous thereto, maybe a month. I don't recall specifically.

Q Previous thereto -- to what?

A To what date you had reference to.

Q Around the 22nd of April? It would have been in March that you had put it in Mr. --

A Approximately.

Q Saunders' room?

A Approximately, yes, sir.

Q And it stayed there for one month, throughout that period, \$120,000.00 in cash?

A Yes.

Q In what denominations?

A Hundred-dollar bills.

MR. BECK: Your Honor, I object. It's irrelevant.

THE COURT: Overruled.

THE WITNESS: Hundred-dollar bills.

BY MR. GENN:

Q In hundred-dollar bills in packets of one-hundred dollar bills; is that right?

A Yes, \$10,000.00 to a pack.

Q Now, whose money was that? Was that 5410's money?

A James T. Benn had title to it.

Q James T. Benn had title to it.

A To the money.

Q Now did he have title to it on April 21st?

A Yes.

Q All right, was there any other money that 5410 had besides this \$120,000.00 in the air conditioning unit of Hamel Park and Saunders?

A I said the air conditioning room.

Q Room; I'm sorry.

A No, that's all that was made available to 5410 Connecticut Avenue Corporation.

Q That's all that was made available?

A That's all we needed, that's all it needed. It only needed sixty.

Q Only needed sixty.

Would you look at the demand note, April 21st, 1959 for \$200,000.00?

A Yes, sir.

Q That's the demand note, is it not?

A Precisely.

MR. SEEGMILLER: If the Court please --

THE COURT: Overruled.

MR. SEEGMILLER: I know Your Honor has ruled but I feel so strongly on this point that I feel I'd be derelict in my duties if I did not bring it forcefully to the attention of the Court again:

There is no issue in this case as to which the amount of cash 5410 Corporation had at that time being interrogated about or any other time has any relevancy whatever.

I move to strike all of the testimony respecting the cash on hand in 5410 Connecticut Avenue Corporation.

THE COURT: Motion denied.

THE WITNESS: I have lost the question. If there is one pending.

BY MR. GENN:

Q There is a \$200,000.00 demand note of April 21, 1959 and April 8th note of \$600,000, demand note, both payable by 5410 Connecticut Avenue Corporation; is that not correct -- totaling \$260,000.00 payable on demand as of April 21st, 1959; is that not a fact?

A That is a fact. As you so stated, Mr. Genn, but it's not the complete fact. You're leaving a part of it out.

Q I think you said that there was available to 5410 Connecticut Avenue Corporation \$120,000.00 to which you had title.

A Yes.

Q Did anyone else have an interest in that \$120,000.00?

A I stated I had sole title to it.

Q Where did you get it from?

A I reported --

MR. SEEGMILLER: I object.

THE WITNESS: I reported it to the Internal Revenue.

MR. SEEGMILLER: Object, Your Honor.

THE COURT: Overruled.

THE WITNESS: I reported it to the Internal Revenue.

BY MR. GENN:

Q Where did you get the \$120,000.00?

A I'd have to look into my books and give you the exact -- how they came about, but I have accounted for it for -- over a period of three months, to the Internal Revenue.

Q You got \$30,000.00 from Mozelle Jones; is that right?

A Yes, as a loan.

Q As a loan.

A Right, sir.

Q That was back in February with the deal with Whiting, was it not?

A Precisely, February -- right thereafter.

Q All right, that takes care of \$30,000.00. We've got ninety to go. Where did you get the remaining \$90,000.00?

A I'll have to -- I have it all documented. I don't have it here.

Q You have it all documented but you don't have it here?

A Don't have it here.

THE COURT: All right, ten-minute recess.

(The midafternoon recess was had.)

THE COURT: You may proceed, Mr. Genn.

BY MR. GENN:

Q Mr. Benn, where are your records showing the sources of the \$120,000.00 at this time? Do I understand they are in your room?

A Oh, they could be over there among a lot of things.

Q Mr. Benn, I think you have testified, examination by Mr. Pardo, about a discussion over the \$75,000.00 and then there was a withdrawal which I think you testified about as to Mr. Sankin for \$20,000.00? And a withdrawal of \$24,000.00 for 5410; is that correct? Do you recall about that in any event?

A Yes, I think we discussed a \$12,000.00 withdrawal and a \$24,000.00 withdrawal and that \$20,000.00 was needed.

Q And twenty --

THE COURT: Was needed, you say?

THE WITNESS: Was needed, Your Honor, thank you, sir.

THE COURT: For the bills that were unpaid?

THE WITNESS: No, the \$20,000.00 was needed for the difference between the \$55,000.00 and seventy-five.

THE COURT: All right.

THE WITNESS: Thank you.

* * *

* * *

(Tr. 5011-
5018)

AFTERNOON SESSION

1:45 p.m.

Thereupon

JAMES T. BENN

a witness, having been previously sworn, resumed his testimony further as follows:

CROSS EXAMINATION (resumed)

BY MR. GENN:

Q Mr. Benn, you received certain notes from the parties who are defendants and intervenors, or referred to as intervenors in this case, Mr. Link, Mr. Pardo, Mr. Betoff.

You transferred those notes to another party, a Mrs. Jones, is that correct?

A Yes.

Q What did you receive from Mrs. Jones for the transfer of those notes?

A I received \$15,000 in cash, and \$250,000 in notes.

Q Do you remember when you received that?

A August 21, 1959.

Q Now the time that you received the \$50,000, or just prior to that time--I am sorry--just prior to your receipt of \$50,000, you paid Mrs. Jones \$30,000 in cash, is that correct?

A Yes, I repaid a loan I had borrowed from her for \$30,000.

Q So that at the end of the fact of the transaction, according to your testimony, is that you received the net benefit of \$20,000, and the notes of Mrs. Jones?

A I received the net benefit of \$20,000, plus the repayment of a \$30,000 loan, plus Mrs. Jones' \$250,000 in notes.

Q Now, what did you do with the \$250,000 in notes from Mrs. Jones?

A Concurrently with the making of those instruments at that same day, within an hour, those notes and the instrumentation connected there were delivered to the Chase-Manhattan Bank Trust Department. It was at that time at 40 Wall Street, New York City.

Q Were those notes of Mrs. Jones ever negotiated -- or transferred?

A There is a question, your Honor, that I am not able to answer. It is a legal question. I will give the facts--

THE COURT: What did you sell to the Chase-Manhattan bank for?

THE WITNESS: We put them there in escrow so that Mrs. Jones would not have possession of the intervenors' notes in the face amount of \$120,000, and in the event any moneys were to be paid on the intervenors' notes, or forthcoming, they would be used first to pay off the indebtedness that Mrs. Jones had created by virtue of the--

THE COURT: Was the Chase-Manhattan Bank to have the \$250,000 in notes which Mrs. Jones made out to you? Is that right, sir?

THE WITNESS: Not at the Chase, no, Your Honor. The \$440,000 are at the Chase-Manhattan Bank. The Intervenor's five notes in the face amount of \$440,000 is at the Chase-Manhattan Bank.

THE COURT: In escrow?

THE WITNESS: In escrow.

THE COURT: How were the \$250,000 of Mozelle Jones' notes to you, as I understood Mr. Genn to ask you a few minutes ago--

THE WITNESS: Yes. Then on December 2, Your Honor, 1959, an agreement was entered into. But immediately prior--not immediately, but immediately after, on August 26, well, to keep continuity, or should I answer his direct question.

BY MR. GENN:

Q If you would, tell me to whom the Mozelle Jones notes were negotiated. What corporation?

A They were placed with the Nationwide Properties, Incorporated.

Q Nationwide Properties?

A Inc., as surplus capital.

Q They were placed with Nationwide Properties. Now, who held, at the time of the delivery and the transfer, all of the outstanding stock of Nationwide Properties?

A James T. Benn. Including all of the authorized--

THE COURT: Including what, sir?

THE WITNESS: All of the authorized. The total amount had been issued.

THE COURT: In other words, James T. Benn was the sole owner of the stock of Nationwide Properties, Inc.?

THE WITNESS: Yes, sir.

THE COURT: And the Nationwide Properties, Inc. in December, 1959, the \$250,000 notes by Mozelle Jones were negotiated by you; is that correct?

THE WITNESS: Not to Mozelle Jones. It was taken out of continuity and that is the reason I asked your permission, sir.

Oh, immediately after the agreement with Mozelle Jones on August 21, 1959, I delivered her notes over to Nationwide Properties, Inc., made a letter out and sent it to the Chase Manhattan Bank, which the Chase Manhattan Bank Trust Department acknowledged on August 25, 1959.

THE COURT: What happened on December 2?

THE WITNESS: On December 2, your Honor, on December 2 I attempted to sell the stock of Nationwide Properties, Inc., and they were to pay \$250,000.

It was changed down to \$220,000, with \$25,000 down, the balance of \$195,000 in notes.

THE COURT: And who were "they"?

THE WITNESS: Mary B. De Long. They were, or still are, the owners of the Star Kist Tuna people, in California.

THE COURT: But you never completed the negotiation of the Nationwide?

THE WITNESS: No, of the Nationwide stock. The instrumentation will show that it is still pending. They paid only \$21,000--not the \$25,000--and decided that they wanted to pay me in cash for all of it, and requested of me that I release the restriction as shown on the stock of the Nationwide certificates that were delivered to Mary B. De Long on December 2, 1959. When I removed the restriction, something else had transpired at that time that they wanted to further reduce it. I refused to go through with the deal. Technically, I do not know where it stands. That is the reason I asked your Honor's permission. They did not complete the agreement of December 2, 1959.

The instrument of December 2, 1959, sets forth specifically that they must pay the \$25,000 down on or before January 8, 1960. There was some problem that came about, and I would not go through with the transaction.

They wanted to buy me out for cash, and eventually it developed that Mr. Garfield--and this is out of independent knowledge, your Honor--and Mr. Nicholson was up there negotiating anyway with Mr. Silver who formed this corporation for me.

THE COURT: The Nationwide?

THE WITNESS: Yes, your Honor. Mr. Nicholson was, I understand, making the offer, and the money was to come from Mr. Nicholson.

Mr. Nicholson, I understand, was to wind up with the intervenors' five notes, and if I had gone through with that, when I discovered that I did not go through with that because they would have wiped out the five intervenors.

That is one reason why I did not go through with the cash transactions that they offered, but they had reduced it, not according to the original terms of the agreement.

Further, they still defaulted on the payment of the additional \$4,000.

THE COURT: Now, do you know where Mozelle Jones' notes are?

THE WITNESS: Yes, your Honor.

THE COURT: I was asking Mr. Genn. He was trying to find that out.

MR. DULANY: May I move to strike the testimony which he gave with regard to Mr. Nicholson on the grounds, (a), it is hearsay, and (b),

unresponsive to the question, either by the Court or by counsel.

THE COURT: Yes.

BY MR. GENN:

Q Would you enlighten us as to where Mrs. Mozelle Jones is as of this time?

A They are encumbered--

Q No, the place, where they are placed. A geographical spot in the United States or in the world.

A They are out of my control and out of my possession.

Q You don't know where they are geographically?

A Not if you want me to do that under oath.

THE COURT: I do not quite mean that, do you? Don't you mean that you could do it under oath but you could not do it of your own knowledge? What do you mean when you say "If you want me to do it under oath"?

THE WITNESS: He wants me to give him a certain geographical position and then he will impeach me. I don't know where these people are. They could be any place today.

THE COURT: All right.

BY MR. GENN:

Q When did you last see the Mozelle Jones notes? First, when, and then where?

A Washington, D. C. prior to April of 1960, I saw them again--

Q Who had them at that time?

A --I saw them again this last year. The latter part of 1959.

Q In whose possession were they?

A Or in between the summer and fall of 1959 and around there.
I don't know the exact time.

THE COURT: They weren't even negotiated until August--

A I mean, 1963, your Honor, that is last--

THE COURT: All right, all right.

THE WITNESS: --this last fall of 1963, your Honor, thank you
for correcting me. They were with a fellow by the name of Robert Buffkin.

BY MR. GENN:

Q On all of the occasions that you have recited, they were with
Mr. Buffkin?

A No, on the first occasion they were pledged for some liabilities
in connection with Secruoser Lairtsudni, in the Commonwealth of Colombia.

THE COURT: Give the reporter a helping hand. How do you spell
that?

THE WITNESS: It is really Industrial Resources backwards.

BY MR. GENN:

Q Now, when did you last have possession or control of the Mozelle
Jones notes?

A I had them available to me the first week in March of 1960,
that they were in my possession freely.

Q Were they in your possession as an officer and director and
shareholder of Nation-wide Properties, Inc.? Or, were they in your possession
in some other capacity?

A Well, sir, only one note was transferred to Nationwide Properties,
Inc. The remaining notes were not endorsed and transferred over legally,

per se, and I was holding those notes because Mary B. De Long and her husband, Charles demanded all of the stock of Nationwide Properties, Inc., which they received and signed therefor on December 2, 1959, and therefore, I held the asset to that stock, since I only had their notes.

* * *

r. 5295)

MR. BENN: At the outset, if Your Honor please, sir, I would like to adopt Mr. Seegmiller's defense and over and above that I have several instruments that I would like to put into the record that has been missed.

THE COURT: Let me ask you this: What you wish to do is have Mr. Dulany stipulate with you that the testimony Mr. Seegmiller elicited in defense of 5410 should now also be received in defense of yourself; is that correct; is that what you mean?

MR. BENN: Yes, sir.

THE COURT: You say you would like to adopt Mr. Seegmiller's defense. Is that what you mean?

MR. BENN: Yes, sir.

THE COURT: Do you have any objection?

MR. DULANY: I assumed these were co-defendants and it was in for him anyway. I have no objection.

* * *

PORTION OF TESTIMONY

of

DEFENDANT JOSEPH PARDO

(Tr. 2539 Through 2545)

BY MR. GENN:

Q The original note is at the Chase Manhattan Bank in New York City.

A To the best of my recollection, that is what I have been advised.

Q Have you been advised as to who is the holder of that note?

A Yes, Mrs. Mozelle Jones.

Q Is it M-o-z-e-l-l-e?

A Yes.

Q. Mrs. Mozelle Jones instituted a legal action against you, did she not, Mr. Pardo, in Law Number 59-7296, in the Civil Court of Dade County?

A May I see it, please?

Q Incidentally, sir, before you proceed, do you have any copies of the litigation you have had of pleadings with Mrs. Jones?

A No, I didn't bring that one with me, no.

Q I asked you, Do you have any copies of any of the litigation?

A Yes.

Q The one I will show you, sir--

MR. GENN: Perhaps we ought to have it identified.

THE COURT: Yes.

MR. GENN: This will be Plaintiff's--

THE DEPUTY CLERK: 57

MR. GENN: --57, marked at pretrial, if the Court please.

(Certificate of dismissal for want of prosecution and attached documents were marked Plaintiff's Exhibit 57 for Identification.)

BY MR. GENN:

Q I show you Plaintiff's 57, which purports to be a certificate of dismissal for want of prosecution and other documents attached and ask you if you can identify that document.

A No, sir, I can't identify this document. None of these documents were any of the ones served upon me. They are from the clerk of the court which certified to certain documents, but I can't identify any of these, but they appear to be documents from the civil court of record in the court of Dade County, Florida.

Q Do you recall, sir, does this document refresh your recollection that a suit had been instituted in Law Number 59-7296?

A Yes.

Q And you were aware, were you not, or perhaps that document would refresh your recollection that there had been, as reflected in that document, a dismissal for want of prosecution?

A That is what this document says, and there is no question about it.

THE COURT: The question is, Does it refresh your recollection?

THE WITNESS: I was never asked anything about it, so, yes, it does refresh my recollection.

BY MR. GENN:

Q And that case was dismissed for want of prosecution?

A Yes.

Q Now, were you familiar with the litigation filed by Mrs. Jones against Mr. Link and Mr. Whiting, which are consecutive to the suits that were filed against you?

A No, I was not familiar with them. I had been advised that they had also been sued.

Q You did not file any pleading on behalf of Mr. Link?

A I didn't file anything in behalf of Mr. Link, to the best of my recollection.

Q To your knowledge, was any pleading of any kind filed on behalf of Mr. Link?

A As far as I can recall that I represented Mr. Link at all, no.

Q By the way, where is Mr. Whiting at this time?

A The record will reflect that he is in prison at the present time. I don't know that.

THE COURT: You do not know it?

THE WITNESS: I have been told that. I have never seen him in prioson.

THE COURT: Well, I am not going to let that in. This witness doesn't know, Mr. Genn.

MR. GENN: I would like to test his knowledge, if the Court please.

BY MR. GENN:

Q Have you received any communications from Mr. Whiting of any kind?

MR. BECK: Your Honor, it is irrelevant and immaterial. Whether he knows it or not is not in issue.

THE COURT: In other words, you concede that Whiting is in Danbury, Connecticut, Federal Correctional Institution, is that right, sir?

MR. BECK: So far as I know he is, yes.

MR. SEEGMILLER: That is our information, but I am sure this witness doesn't know of his personal knowledge.

THE COURT: I mean, so far as you know. You are his counsel, Mr. Beck. Is he in there?

MR. BECK: As far as I know he is.

THE COURT: All right, as far as you know. You mean, if he hasn't escaped overnight or something like that? Is that what you mean? You know that he was convicted and that he was sentenced to serve time in the Danbury, Connecticut, Correctional Institution.

MR. BECK: Yes.

THE COURT: Very well.

BY MR. GENN:

Q Have you been in communication with Mr. Whiting at all, sir, during the course of the litigation?

A Yes, I did receive a letter from Mr. Whiting.

Q From where?

A From where he is in prison.

Q Was there any discussion in the course of that letter about the status of the Mozelle Jones litigation?

A Not that I recall, no.

Q Do you have any independent knowledge of the status of the Mozelle Jones litigation so far as Mr. Link and Mr. Whiting are concerned?

A Except what Mrs. Link has advised me.

Q I said personal knowledge.

A No personal knowledge.

MR. GENN: I would like to have Plaintiff's 57 admitted in evidence, if the Court please.

THE COURT: Any objection, gentlemen?

MR. SEEGMILLER: Well, I would like to look at it. I have never seen it.

THE COURT: All right.

MR. GENN: By all means. This was shown at pretrial, if the Court please.

MR. SEEGMILLER: I am sorry. I have 187 pretrial exhibits, and I can't remember. I have no objection.

THE COURT: I don't blame you.

MR. SEEGMILLER: I have no objection.

THE COURT: All right. Have you seen it now, Mr. Benn?

MR. BENN: I beg your pardon, Your Honor.

THE COURT: Have you seen this instrument, Plaintiff's 57 for Identification?

MR. BENN: Prior to now, no, sir, I have not; but I have seen it now. It is an authenticated copy.

THE COURT: In other words, you have no objection, Mr. Benn.

MR. BENN: No, Your Honor.

THE COURT: Now, Mr. Beck.

MR. BECK: I object to it on the grounds that it is irrelevant and immaterial to the complaint.

THE COURT: Let me see it. Mr. Genn, of course you are not offering this for impeachment, because it has been recognized and admitted here. Why do you offer it, for what purpose?

MR. GENN: He has admitted it, Your Honor, but I think there might be some question in terms of the date. I don't think there is a

date that he gave, and the document will show the official court records as to date. If he wishes to testify about it and wants to read it, I have no objection.

THE COURT: Do you know the date that the Mozelle N. Jones v. Joseph Pardo suit at law, 59-7296, Civil Court of Record in and for Dade County, Florida, was dismissed for lack of prosecution?

THE WITNESS: No, I don't know that, but I know that another suit was started after that.

THE COURT: Whatever that may be. I will receive this because he doesn't know. All right, 57 is received in evidence. It will be observed that 57 has the double certificate on it.

(Plaintiff's Exhibit No. 57 for Identification was received in evidence and marked Plaintiff's Exhibit No. 57).

PORTIONS OF TESTIMONY

of

DEFENDANT HARRY LINK, JR.

(Tr. 2821 Through Tr. 2827)

Q. Did you have any further transactions with Mr. James T. Benn?

[MR. LINK] A. I did.

Q When would that be, sir?

A In the latter part of May of 1959.

Q What did that involve, sir?

A That involved the purchase of 50 shares of stock of 5410 Connecticut Avenue Corporation, Washington, D.C.

Q Prior to that time had you had any dealings with Mr. James T. Benn with regard to Surinam American Timber Company?

A Not in my own behalf.

Q Let's go back then. Have you had any dealings with Mr. James T. Benn that were not on your own behalf which you haven't stated, up until May of 1959?

A In the latter part of 1958 I introduced Mr. Benn to a Cuban client of mine with respect to possible investing some development capital in the Surinam Timber leases which Mr. Benn had. I had no direct interest in it whatsoever.

Q Who was this client, sir?

A Well, there were several. One was Dr. W.E.Klawans and several of Dr. Klawans' associates in Havana.

MR. GINN: Your Honor, with the Court's permission, I am going to stop at this point. There is no question between counsel but that this should be Klawans (spelling) K-l-a-w-a-n-s. The deposition refers to "awn". It should be Klawans.

THE COURT: Do any counsel object to that spelling?

(All counsel indicated there was no objection.)

THE COURT: The record will so show.

MR. GENN: Will you read Klawans instead of Klawnas?

(The reading resumed as follows:)

"A Well, there were several. One was Dr. W. E. Klawans and several of Dr. Klawans' associates in Havana."

Q Would you explain what this deal was going to be in a little more detail?

A Yes. My friends and clients in Cuba had at that time a considerable amount of capital which they were interested in investing in the development of various projects, and they expressed an interest in making an investment in Surinam American Timber Corporation.

Q At that time did you get in touch with James Benn or did you know that he already claimed an interest in this Surinam Timber Company?

A I already knew he claimed an interest in it.

Q Who came to you first on this?

A James T. Benn.

Q He asked you to try to find somebody who would be interested in investing in the venture.

A He told me that he was about to enter into a contract with some Cuban shippers in Miami for the sale of a substantial quantity of timber in Cuba. I suggested to Mr. Benn that it might be to his advantage, in order to be sure that he collected his money when shipments were made, to clear all such transactions in Cuba through my friend and client, Dr. Klawans, with the result that we made two or three trips to Havana, which finally

resulted in Dr. Klawans and his associates making an investment of \$20,000 in Surinam American Timber Corporation.

Q When was that investment made?

A In the latter part of 1958.

Q What form did that investment take? Did they buy stock in it or what?

A My recollection is that for \$20,000 they bought a half-interest in Surinam American Timber Corporation and James T. Benn reserved the right to repurchase one-half of that interest for \$10,000 over a two or three-year period. The details specifically I don't know, but that is about it.

MR. SEEGMILLER: I would object to that and move that the last answer be stricken, on the ground it has no relevancy or materiality with respect to any issue between plaintiff and 5410.

THE COURT: I am going to let it in going to the question of conspiracy. It may be stricken later but I am going to let it in now.

MR. SEEGMILLER: To explain my position, I think the value of timber concessions, the value of International Timber stock, anything going to that is not in issue between this plaintiff and 5410.

THE COURT: This is not the International Timber stock.

MR. SEEGMILLER: I think it is a forerunner of International Timber.

MR. GENN: There will be some connecting testimony.

MR. SEEGMILLER: That is the basis of my objection.

THE COURT: Very well.

MR. GENN: Not only that, Your Honor, but I might suggest to Your Honor that part of this goes to knowledge of previous dealings and a pattern of conduct that may be important to the plaintiff's point of view.

THE COURT: That is what I am looking for.

MR. GENN: Actually, I think it pertains to previous knowledge and past conduct.

I might state that at the conclusion of the statement that was just given there was a request to go off the record. There was a discussion off the record, and a request to go back on the record and the witness stated:

(The reading resumed as follows:)

"THE WITNESS: I can't tell you any more than I told you.

"MR. DULANY: It wasn't on the record. Would you repeat that last statement you made, as to your best recollection of what the arrangements were between Mr. Benn and Mr. Klawans and his associates with regard to the \$20,000 investment in Surinam American?

"THE WITNESS: My best recollection is that Mr. Benn sold to Klawans and associates a one-half interest in Surinam American Timber Corporation for \$20,000, and Mr. Benn reserved the right to repurchase one-half of that which he sold to Klawans and associates for \$10,000 over a two to three-year period.

"Q Do you know whether he ever exercised his right to repurchase?

"A I do not.

* * * *

PORTIONS OF TESTIMONY OF DEFENDANT DINTY WHITING

Tr. 2963-
2971)

The Witness: All right. That specific sum of money represented a payment that had been made to me -- let's see, on the 18th of May, or \$18,000 thereof specifically had been made to me by Mr. Benn in repayment of some moneys that I had loaned him in February of this year.

By Mr. Dulany:

Q When had you gotten that, on the 18th?

A 18th of May.

Q And he had borrowed that from you in February?

A That is correct.

Q Did he state to you for what purpose he had borrowed that money in February?

A No.

Q Had it been a secured loan from you?

A It was initially part and parcel of the transaction that he and I entered into, but from which he released me at my request in February, which transaction I recited earlier in this deposition, namely, my purchase of the Surinam-American Timber Corporation stock.

I had given him cash and notes at that time. When Mr. Benn released me from the transaction in partial consideration therefor he requested the usage of the money and executed notes to me accordingly for the same.

Q How much had you paid him for your Surinam purchase which was later rescinded?

A \$50,000.

Q Was that in cash or in notes?

A That was partially in cash and partially in notes.

Q How much was cash, sir?

A \$10,000.

Q And the balance was notes?

A That is correct.

Q At the time you were released of your obligation to complete that transaction, what was returned to you, sir?

A The agreement that we had entered into.

Q And what else?

A That's all.

Q Have you ever recovered any of the amount that you put in other than this \$18,000?

A No.

Q Is it still owing to you?

A That is correct. He owes me the difference between \$18,000 and \$50,000.

Mr. Hilland: You mean he still does?

The Witness: Oh, yes, surely. I have a note to that effect.

By Mr. Dulany:

Q What arrangements have been made for the repayment of that?

A I have a year's note from that day which is due and payable next year.

Q Have you made arrangements to cancel that as against your indebtedness to him?

A We haven't made any arrangements to that effect. It is possible that we might. It is possible. It depends upon what my cash position will

be here in the next thirty days in connection with certain transactions that I am negotiating in South America at this time.

Q Now, the \$50,000 which you paid to Mr. Benn in cash and notes, was any of that derived from any transactions with Mr. Benn?

A None.

Q Was that derived from transactions wholly apart from anything Mr. Benn was connected with?

A Yes, wholly apart.

Q Where did Mr. Benn pay you the \$18,000?

A Here in Washington.

Q Was it in the form of a check or was it in the form of cash?

A Cash.

Q Was it one thousand dollar bills?

A Hundred dollar bills.

Q Where did the transaction actually occur?

A At the home of a friend of mine.

Q Can I have the name of that friend, sir?

A Specifically in the home of Mrs. Mary Nelms.

Q At that time was there discussion with Mrs. Nelms with regard to this property?

A Mrs. Nelms was not present at the time of this instant transaction that we are discussing.

Q Was it given to you, repaid to you, or however you wish to word it, with the idea that it would be used by you as down payment for this property?

A Not at all. I had just returned from South America, as I have recited several times, where I was engaged in several negotiations, one situation in Panama, two in Costa Rica, one in Colombia, and I needed cash to bind certain options.

Q Did Mr. Benn indicate where he had gotten the money from to pay you the \$18,000?

A No, nor did I ask.

Q Is it unusual for him to carry large amounts of cash on his person?

A I don't know Mr. Benn's business affairs that well.

Q Have you seen him at other times carry large amounts of cash on his person?

A That's a relative term.

Q I will say over three or four thousand dollars, which is large to me, sir.

A I don't know whether it is usual or unusual.

Q Did he carry it in his briefcase?

A The specific sum that he handed to me was out of his -- I don't remember whether he got it out of his briefcase or pocket.

Q Out of his pocketbook?

A I don't recall.

Q Does Mr. Benn at this time owe you any other sums of money?

A Aside from that which I have just recited, no.

Q Do you owe him any sums of money other than the notes for the purchase of the stock?

A No.

Q When was the last time you saw Mr. Benn?

A About two weeks ago.

Q Where?

A Havana.

Q Did you discuss this case with him?

A Yes. We had a few minutes on it, not very long, as a matter of fact. We were preoccupied with other matters.

Q Did you ask him if he was going to enter an appearance in this case?

Mr. Hilland: I object to that as being irrelevant and immaterial to any issue involved.

THE COURT: I sustain it. If anybody wants to make that motion on the other side -- I think Mr. Hilland was serving at that time as counsel for 5410.

MR. SEEGMILLER: I will object to it.

THE COURT: All right, I will sustain it and I will strike whatever the answer was to it. I assume the answer was given.

MR. GENN: The answer was given; but it is stricken, I presume.

THE COURT: That is right.

(The reading was resumed as follows:)

By Mr. Dulany:

Q When you paid Mr. Benn, did you pay him by check or by cash?
I mean the \$20,000.

A The \$20,000 I gave him in cash.

Q Had you carried that amount of cash with you from May 18 until that date?

A Yes. Yes, it had been with me at all times.

Q Do you usually carry that sum of money around with you?

A That is a little larger than I usually carry.

Q Do you maintain a bank -- I mean, do you have a banking account in the District?

A No. No, I do not.

Q Do you have a bank account in Florida?

A Yes, two, three.

Q Why didn't you deposit the money?

A Well, largely because I was expecting to leave here almost momentarily to go back to South America in connection with my other business there, and I wanted to take cash with me.

Q Did anyone else pay cash to Mr. Benn, to your knowledge?

A I don't recall.

Q Where were you physically when you gave him the cash?

A In the Army-Navy Club."

MR. GENN: We will now go to page 112, the mid-part of the page, cross-examination by Mr. Genn:

(The reading was resumed as follows:)

Q Mr. Whiting, where are the notes that the shareholders gave to Mr. Benn at the present time?

MR. GENN: This, if the Court please, being in reference to July 22d, 1959, at the time of the deposition.

A The original of the notes of course were delivered to Mr. Benn.

Q Do you know the whereabouts at this time?

A I do not.

Q Where were they the last time that you saw them?

A In Mr. Benn's possession on the 26th of May.

Q Mr. Benn then took possession of them and did not turn them over to Mr. Saunders, to your knowledge?

A I don't know what he did with them.

Q Have you been apprised of whether or not those notes have been negotiated to any third person?

A I have not.

Q In the event you desired to make payment on those notes, to whom would you make the payment?

A I would seek Mr. Benn.

Q Where would you seek Mr. Benn?

A Oh, through any one of several attorneys that Mr. Benn retains.

Q Name the attorneys that you would speak to if you wanted to contact Mr. Benn with respect to the notes.

A Primarily to Mr. Saunders or to Mr. Roman in Miami.

Q Is it fair to say, then, that either one of these gentlemen will at most times know Mr. Benn's whereabouts?

A I can't say that. I don't know.

Q How does one go about to ascertain Mr. Benn's whereabouts, to your knowledge?

A Beyond what I have just recited I don't know.

Q Do you know where Mr. Benn is at the present time?

A I do not."

MR. GENN: That is at the bottom of 113; and we proceed to 133, at the top of the page.

(The reading was resumed as follows:)

Q Are you in present deals with Mr. Benn, at the present time?

A No. We are discussing one or two transactions which we might or might not enter into together, but I have certain matters down there that I am actively engaged in right now that do not anticipate Mr. Benn's participation.

Q At that time, however, the time of the conversation, you were in prospective deals or business ventures with Mr. Benn. Is that correct?

A No more then than now. One or two things that we discussed as being transactions of possible mutual interest.

* * *

PORTIONS OF TESTIMONY OF ATTORNEY ARTHUR J. PHELAN

Tr. 1812-
825)

Thereupon

ARTHUR J. PHELAN,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GENN:

Q Your name, sir?

A Arthur J. Phelan -- P-h-e-l-a-n.

Q What is your occupation, sir?

A I am an attorney.

Q For how long have you held that occupation?

A Since 1925.

Q And you are associated or a partner in the firm of Hogan & Hartson; is that correct?

A That is correct.

Q In Washington, D. C. ?

A Yes.

Q Mr. Phelan, did there come a time in the course of your practice when you had occasion to meet Mr. Joseph Garfield?

A Yes; I met Mr. Garfield in May of 1959.

Q Did you meet him in the company of any other person?

A Mr. Donald Nicholson, of Florida, and Mr. Garfield came to my office on the morning of May 14th, 1959.

Q They came to your office on the morning of May 14th, 1959; is that correct?

A That is correct.

Q And as a result of those discussions, did you do anything pursuant to those discussions?

A I prepared a letter addressed to Mr. Benjamin Saunders, and took that letter over to Mr. Saunders' office at about noontime on May 14th.

Q Mr. Phelan, I am going to show you what purports to be a letter of May 14th, 1959, marked Garfield's Pretrial Exhibit 31, which I request the Clerk to mark as Plaintiff's Exhibit 48 for identification.

(Letter May 14, 1959, Phelan to Saunders, was marked for identification as Plaintiff Sankin's Exhibit No. 48.)

I will show you, sir, Plaintiff's Exhibit 48 for identification and ask you if you can identify that letter.

A This is a copy of the letter that I wrote and delivered to Mr. Saunders on that day.

Q I notice, sir, that there appear to be pen notations at the bottom or at the foot of that page. Would you state whether those are in your handwriting, sir?

A On this copy they are in my handwriting, yes.

Q And this is the letter that you sent to Mr. Saunders?

A Delivered to Mr. Saunders.

Q Delivered to him.

A Yes.

Q Did you deliver it to him in person?

A No; he was not in his office when I went there, and I left it in his office.

Q Now, would you state, sir, the circumstances of the delivery, what occurred?

A I had first talked to Mr. Saunders on the telephone and explained generally what I had in mind in delivering him the letter; I told him I was going to bring it over.

Q May I stop you there, please, Mr. Phelan? Did this conversation with Mr. Saunders take place on the 14th, on the date of the letter?

A On the morning of the 14th.

Q And the conversation took place prior to your actual delivery of the letter?

A That is correct.

Q Did it take place prior to the preparation of the letter?

A I can't answer that. I would guess no; but --

Q All right.

Now would you state, sir, if you will, what you told Mr. Saunders about this matter and what Mr. Saunders told you, in the conversation on May 14th, prior to the delivery of the letter marked as Plaintiff's Exhibit 48 for identification?

A I told him that Mr. Nicholson and Mr. Garfield were in my office; that I had gone over Mr. Nicholson's file in the matter and we had had a conference all morning; that it was Mr. Garfield's position that Mr. Benn was overreaching him, and he wanted to get a certificate evidencing his interest in the 5410 Corporation.

I asked Mr. Saunders at that time if 100 shares or any stock had been issued in 5410. And my recollection is that he said none had been issued.

I told him the contents generally of my letter, and I wanted to deliver stock certificates and stock powers, or a stock certificate and a stock power.

He requested me on the telephone not to bring the originals, but to send copies. And that is the reason for the notation on the bottom of the letter.

Q Now do I understand, sir, then in the course of your conversation there was some mention made about whether or not there had been an increase in the stock of 5410, as authorized stock?

A That was the following day.

Q Now, were there any other matters that you can recall in the course of the conversation on May 14th, prior to the delivery of the letter, in substance?

A I of course at this late date can't remember the details of it. All that I do recall is that I outlined generally Mr. Garfield's position and the basis for the letter.

Q Then you did proceed, sir, to deliver this letter marked as Plaintiff's Exhibit 48?

A I did.

Q Is that correct?

A That is correct.

Q Was Mr. Saunders in the office at that time?

A No, he was not.

MR. GENN: I would like to have Plaintiff's Exhibit 48 for identification placed in evidence; I will move to have it admitted at this time, if the Court pleases.

THE COURT: Is there objection?

MR. PARDO: Yes, I have objection, if the Court please.

THE COURT: And your objection?

MR. PARDO: Since this does refer to another document which was part and parcel, I think that it should go in in toto as presented. And it would appear as if --

THE COURT: I will take a look at it.

MR. PARDO: Thank you.

MR. BECK: Your Honor, may I state my objection?

THE COURT: Just let me read this first.

(Having read:) Yes, Mr. Beck.

MR. BECK: Your Honor, I object to the introduction of Plaintiff's Exhibit 48, and I also move that the testimony of the witness regarding it be stricken, on the grounds that it is irrelevant and immaterial to any of the issues in the complaint. It well may be relevant and material to the issues in the cross-claim, but not to the complaint. Thank you.

THE COURT: Isn't there in evidence this stock certificate, 100 shares?

MR. BECK: Yes, sir.

MR. GENN: If the Court please, I propose to inquire about that. But of course --

THE COURT: Isn't that in evidence?

MR. GENN: Yes, it is.

THE COURT: Ask Mr. Phelan if that is his stock certificate. And then show it to Mr. Pardo.

MR. SEEGMILLER: If the Court pleases, I am not quite sure, but I believe I have an objection, that I don't think it has anything to do with 5410, so far as this witness or the other record has indicated. Has it been shown that Mr. Saunders was an officer of 5410 at this time?

THE COURT: It has been shown he was secretary.

MR. SEEGMILLER: That being so, then, I won't object.

BY MR. GENN:

Q I will show you at the same time, Mr. Phelan, three exhibits marked Plaintiff's Exhibits 30, 31 and 28, and ask you if from those exhibits, which are originals, you can ascertain which of those you enclosed as a photostat in your original letter to Mr. Saunders -- speaking of the May 14th letter, now.

A Plaintiff's Exhibit 28 is the original of the stock power referred to in my letter. And Plaintiff's Exhibit 30 is the original of the stock power referred to in my letter. As I say, I had photostats made of these after talking with Mr. Saunders, and delivered the copies, along with the letter.

MR. BECK: Your Honor, may I object and move that it be stricken, once again on the grounds that these items and this testimony go to the ownership of 5410 Connecticut Avenue Corporation, which is not involved in the complaint. It is involved in the various cross-claims.

And I don't want to keep jumping up and repeating myself. So if I could have an understanding that I have a continuing objection on that grounds, --

THE COURT: Object any time you think you should.

MR. BECK: Very well. Thank you.

THE COURT: Do you have anything else to say, Mr. Pardo?

MR. BECK: You overruled me on it?

THE COURT: I overruled you on it, yes.

MR. PARDO: I join in Mr. Beck's objection. And for my other objection, I withdrew it, since now it does come in.

THE COURT: In other words, you are limiting your objection now on the same grounds Mr. Beck objects?

MR. PARDO: Yes, sir.

THE COURT: I will overrule your objection. I will receive Plaintiff's Exhibit 48 in evidence.

(The letter heretofore marked for identification as Plaintiff Sankin's Exhibit No. 48 was received in evidence.)

BY MR. GENN:

Q Now, Mr. Phelan, did you have on that day, May 14th, after the delivery of the letter marked as Plaintiff's Exhibit 48, any further discussions with Mr. Saunders?

A I got Mr. Saunders on the telephone later that afternoon and asked him about a reply to my letter. And he said no decisions had been reached, but he would get in touch with me later.

Mr. Garfield and Mr. Nicholson left that afternoon and went back to Florida. And the following day Mr. Saunders called me.

Q Would it be on May 15th? Is that correct?

A That is correct.

Q And the conversation with Mr. Saunders on May 15th, would you state what was stated by Mr. Saunders and what you said to Mr. Saunders?

A Well, generally Mr. Saunders asked me what Mr. Garfield wanted. And we had quite a long discussion. I naturally can't remember all the details of it. Mr. Saunders indicated he would like to have a letter from

me, setting forth in detail Mr. Garfield's position. I told him I of course would have to talk with Mr. Nicholson and Mr. Garfield concerning that.

At that point Mr. Saunders said, "Does Garfield want a rescission?" And I said I didn't know, that I would have to again check on that.

In that conversation Mr. Saunders told me that Mr. Benn was willing to have a certificate for 100 shares of stock in 5410 issued in Garfield's name. And I asked Mr. Saunders whether that represented the entire capital stock of 5410. He said that he didn't know, he wasn't sure, but would let me know.

Mr. Saunders did call me back later on that day and told me that there were 250 shares of stock authorized in 5410. And he repeated that Mr. Benn was willing that 100 shares should be issued to Garfield..

We then had quite a discussion as to what possible basis there was for Mr. Benn winding up with 60 per cent of 5410, and Mr. Garfield, who had put up all the money, winding up with a 40 per cent interest in it.

Q You indicated you had stated, sir, Mr. Garfield, "who had put up all the money." In the course of your discussion with Mr. Saunders, did you state to him that Mr. Garfield had put up all the money?

A I told him that that was my understanding.

Q Would you proceed with the remainder of the conversation on May 15?

A Well, that about wound it up. Mr. Saunders didn't give me any very satisfactory explanation, and --

MR. PARDO: I am going to object to that, as a conclusion on his part.

THE COURT: I will sustain it.

MR. PARDO: Thank you.

THE WITNESS: As I say, that wound up the conversation. And I reported the substance of my conversation to Florida, to Mr. Nicholson.

BY MR. GENN:

Q Now, at that point, were there any further contacts thereafter with Mr. Saunders, of any kind?

A Oh, I had several telephone talks with Mr. Saunders, in an effort to get an answer to my letter, and also --

Q Now you are speaking of in an effort to get an answer to which letter? The letter of May 14?

A My May 14th letter.

Q All right, sir. When were those conversations, approximately?

A During the days following the 14th, or following the 15th.

I learned that Mr. Nicholson and Mr. Garfield were coming to Washington on May 21st, and I endeavored to arrange a conference between Mr. Saunders and Mr. Benn on that date.

Q You say you endeavored, sir. Do you mean you communicated that request to Mr. Saunders?

A That is right.

Q All right.

A Mr. Saunders told me that Mr. Benn was a hard man to reach; that he was not in Washington; but he would try.

On the morning of May 21st I talked to Mr. Saunders. He said Mr. Benn was not in town, and therefore no conference could be arranged,

unless we wanted to come and see him. I told him that without Benn being present that I saw no point in the conference. So none was had on that day.

Q That was May 21st?

A May 21st.

Q Was there any further contact with Mr. Saunders?

A The following morning, on May 22d, Mr. Saunders called me on the telephone and asked me about a conversation that had taken place the night before between Mr. Garfield and Mr. Benn on the telephone. He told me that during that conversation Mr. Garfield had asked for a rescission of their entire arrangement; did I know anything about it. And I said no, I had not heard anything about it. I said, "I'll try to find out," and I called Florida. Mr. Nicholson apparently attempted to verify the --

Q Are you telling him what you would do; you are stating what you would do?

A I told him I would call Mr. Nicholson -- and I did.

Q You did call Mr. Nicholson?

A I did.

Q As a result of those conversations, did you talk with Mr. Saunders again?

A Yes; I called Mr. Saunders back and told him that there had been such a conversation, and that Mr. Saunders should contact Mr. Nicholson directly.

Q Thereafter did you have any further conversations with Mr. Saunders or any contacts or communications, up to May 27th, of 1959?

A There may have been one or two telephone conversations with respect to trying to make appointments and things of that kind. But we never did discuss the situation after that.

Q Now on May 27th did you have an occasion to address a letter to Mr. Saunders?

A Yes. I prepared and delivered on that day a letter.

Q I show you what appears to be Garfield's 38, Pretrial exhibit number, and ask the Clerk to be kind enough to mark this as Plaintiff's Exhibit 49 for identification.

(Letter May 27, 1959, Phelan to Saunders, was marked for identification as Plaintiff Sankin's Exhibit No. 49.)

Mr. Phelan, I show you Plaintiff's Exhibit 49 for identification and will ask you if that appears to be a copy of the letter you addressed or delivered, rather, to Mr. Saunders on May 27th.

A That is a copy of my letter which I prepared and delivered that day.

Q I also show you Plaintiff's Exhibit 31, which purports to be a document in reference to International Timber Corporation, and I will ask you whether Exhibit 31 is the document referred to in Plaintiff's Exhibit 49 for identification.

A Yes; that is the original of that document.

Q Did you send a photostat to Mr. Saunders, or did you send the original? Do you recall?

MR. SEEGMILLER: If the Court pleases, I object --

THE WITNESS: I sent the original --

THE COURT: Yes, sir?

MR. SEEGMILLER: I object to any testimony regarding International Timber Corporation, because it is irrelevant and immaterial to any issue between the plaintiff and the defendant in this case.

THE COURT: Overruled.

THE WITNESS: That is the original. And I sent the original on that occasion -- or delivered the original on that occasion.

* * *

PORTIONS OF TESTIMONY

of

ATTORNEY DON NICHOLSON

(Tr. 1859 Through Tr. 1874)

BY MR. GENN:

Q Did you ever practice in the District of Columbia, sir?

A Yes.

Q When was that?

A In 1951.

Q When did you become a member of the bar of the District of Columbia you best recall?

A In 1951.

Q And, thereafter, you practiced in Florida?

A Yes. I practiced in Florida before and after that.

Q What legal training did you have in school? What school did you attend?

A I went to Harvard Law School.

Q What type of work is your main activity in the practice of law? Do you have any specialty of any kind?

A It is fairly diversified practice. I would say general practice, in the vernacular.

Q Mr. Nicholson, you are the attorney for Joseph Garfield, is that correct?

A Yes.

Q You have represented him since when, sir?

A I believe I first worked for Mr. Garfield in about 1955.

Q Was that a continuous day to day representation?

A Not really. I first represented Miami bottle Gas Company in isolated instances; and shortly thereafter, Mr. Garfield personally in a few unrelated matters; and through the years, I came more and more to represent Mr. Garfield's interests.

Q Now, I am going to direct your attention, sir, to certain limited areas. Would you state, sir, whether or not you came to the District of Columbia with Mr. Garfield on the midnight flight or thereabouts of May 25th, 1959?

A I did.

Q You took that flight from where, sir?

A Miami International Airport.

Q Do you remember about what time you arrived at the Miami National Airport on May 25th, 1959?

A As I recall, it was between 11:20 and 11:30 p. m.

Q And who accompanied you?

A I went to the airport alone.

Q Did you meet Mr. Garfield at the airport?

A Yes, inside the building.

Q At about what time?

A At about 11:25.

Q Did you see any other individual who may be involved in litigation in this case there on that day of May 25th at the airport?

A Yes.

Q Who was that?

A Mr. Joseph Pardo.

Q Now, did you know Mr. Joseph Pardo and had you been acquainted with him before this occasion of May 25th?

A Oh, yes.

Q In what connection in general did you know Mr. Pardo, in what manner?

A Well, I knew Mr. Pardo as a fellow attorney in Dade County and had for a number of years. I had been engaged in litigation against Mr. Pardo in the past.

Q Did you have occasion to have any conversation with Mr. Pardo at that time when you met him on May 25th at the airport?

A Yes.

Q Would you state, sir, in your own words, what happened, what Mr. Pardo said to you and what you said to Mr. Pardo on that occasion?

A I saw and recognized Mr. Pardo as I was entering the Terminal Building; and as I recall, Mr. Pardo's wife had brought him to the airport. Mr. Pardo introduced me to her. We passed social amenities for a couple of minutes, and she left.

As Mr. Pardo and I went into the building, we saw Mr. Garfield in the offing. He was over by the counter. And I said in effect to Mr. Pardo, "I'm headed to Washington tonight. You wouldn't believe this, but Mr. Garfield is tangled up again with Mr. James T. Benn." I think I called him the one and only or incomparable James T. Benn. And I asked Mr. Pardo if he by any chance were going to Washington on the same matter or to see Mr. Benn, that Mr. Garfield and Mr. Benn had gotten involved in a very --

Q I will stop you there. You said to Mr. Pardo about tangling again between Mr. Garfield and Mr. Benn. Now, had there been a previous occasion when there had been some kind of dispute between them?

A Yes. Some years before, there had been several pieces of litigation involving Mr. Garfield and Mr. Benn directly or indirectly.

Q Had Mr. Pardo been a participant in any of that litigation?

A Mr. Garfield had represented a corporation which, it is my understanding, had been formed and was solely owned by Mr. Benn at one time, which was engaged in the sale to Mr. Garfield's company of what was called the Upper Keys Gas Properties. It is part of a gas system down in the Florida Keys.

Q I think you said Mr. Garfield formed that corporation.

A Mr. Benn, I beg your pardon.

THE COURT: I think you said that Mr. Garfield represented Benn.

THE WITNESS: No, Mr. Pardo had represented the corporation which had been formed by Mr. Benn.

MR. SEEGMILLER: Objection, if the Court please. It hasn't been shown that this witness has any personal knowledge of that prior litigation. It appears to be hearsay. I object unless it can be identified.

THE COURT: Did you represent Mr. Garfield in that litigation?

THE WITNESS: Yes, I represented him and his company.

BY MR. GENN:

Q And during the course of your representation of Mr. Garfield, did Mr. Pardo appear in that litigation in any way?

A Yes. Mr. Pardo represented the company which Mr. Benn had formed and which later sold these properties to Mr. Garfield's company.

Q Now the name of that company was what, sir?

A Well, that is hard to say. I believe it was FKG Company. There was a Florida Keys Gas Corporation and an FKG Company, and all of these corporations changed their names several times; but at that time I believe FKG Company, Inc., was the name of the Benn corporation.

Q In any event, Mr. Pardo did appear as an attorney in that litigation, is that correct?

A Yes.

Q Now, going back now to the meeting of May 25th at the airport, would you state, sir, any further conversation you may have had with Mr. Pardo in reference to Mr. Benn and Mr. Garfield?

A Well, as I stated, I asked Mr. Pardo if he by any chance were going to Washington on this same matter or to meet Mr. Benn, that as hard as it might be for Mr. Pardo to believe with his knowledge of the relationship between these particular individuals, the two had become involved in a dispute involving an apartment building in Washington.

Q Are you telling us now, sir, what you told Mr. Pardo?

A Yes.

Q All right.

A Which was named for Mr. Garfield, the Garfield Apartment, and that I was on my way to Washington to conclude a rescission or cancellation of all the transactions between them.

Mr. Pardo stated that he was not aware of any such transaction, and that he was not going to Washington to meet Mr. Benn, that he was there on other business on his way to either St. Louis or Louisville, I forget which. I believe it was St. Louis, Missouri.

Q Now, where did this conversation with Mr. Pardo take place which you have just stated?

A That took place right in the Airport Terminal Building.

Q Now, was there any other conversation in the Airport Terminal Building, in substance, besides what you have already stated.

A No. We approached Mr. Garfield, or he had moved off in another direction and approached us. We spoke, exchanged amenities among ourselves, boarded the plane, and for a portion of the time I sat in a seat alongside Mr. Pardo on the plane.

Q You sat in a seat alongside Mr. Pardo on the plane. Did you have any conversation with Mr. Pardo in the course of that arrangement in reference to any matters pertaining to this case?

A Yes -- well, not in reference to this case, no. We just talked, discussed legal matters in general lawyers talk, nothing to do with Garfield or Benn or the apartments or Washington or anything, sir.

Q And when did you arrive on that flight, sir, in Washington?

A I believe it was about 5:15 in the morning.

THE COURT: That was May 26th?

THE WITNESS: Yes, sir.

BY MR. GENN:

Q This was May 26th?

A Yes.

Q Did you have any further discussions with Mr. Pardo on that occasion in reference to anything pertaining to this case?

A No, I didn't see Mr. Pardo any further on that trip.

Q Now, did there come a time, taking you to another occasion, Mr. Nicholson, did there come a time when you had a conference or you attended a meeting at which Mr. Stanley Winn was present some time after May of 1959?

A Yes. I met Stanley Winn only once.

Q When was that?

MR. BECK: Your Honor, before this question is answered, may we approach the bench?

THE COURT: Come to the bench.

(AT THE BENCH:)

MR. BECK: I meant to tell Your Honor this morning and I overlooked it, Stanley Winn has returned from Africa. I got in touch with him Saturday, and he said that he would be here Wednesday morning. He could not get here before that time.

THE COURT: That is Wednesday of this week?

MR. BECK: Yes. I just wanted to call that to your attention. He apparently returned from Africa Friday.

MR. GENN: He will in any event be available on Wednesday.

MR. BECK: Yes.

THE COURT: Very well, and will continue to remain here until this case is terminated.

MR. GENN. Very Well. Thank you.

(IN OPEN COURT:)

BY MR. GENN:

Q Now, Mr. Nicholson, will you fix the time when you had occasion to meet with Mr. Winn?

THE WITNESS: Your Honor, is it all right if I lower this?

THE COURT: Surely.

THE WITNESS: I met Mr. Winn at 9:55 a.m. on August the 18th, 1959.

BY MR. GENN:

Q How do you remember that date and time so specifically, Mr. Nicholson?

A Because it was a very important meeting, and I made notes of it shortly thereafter. And I recall that I was supposed to be there at 10:00 a.m., and I arrived about five minutes early.

Q Now, will you state, sir, what was the substance and what was discussed at the meeting with Mr. Winn pertaining to any matter in this case?

THE COURT: Where was this meeting?

THE WITNESS: This meeting began in the coffee shop of the Carillon Hotel in Miami Beach; and after about thirty minutes of coffee and rolls -- in Miami Beach I guess they are bagles, to me they are rolls -- we then went to Mr. Benn's, Mr. Winn's room, which I recall as 911.

BY MR. GENN:

Q Who was present at that meeting?

A Mr. Garfield and Mrs. Garfield were there with me. Mr. Winn was there and Mr. George Laris.

Q Mr. George Laris?

A Yes.

Q Do you know how to spell that, Mr. Nicholson?

A L-a-r-i-s.

Q Now, could you tell us, sir, what were the topics of discussion, first, before we get into the specifics, at that meeting?

A Well, the scheduled topic of discussion was Mr. Winn's participation and part in the reported acquisition by the five individuals of the stock of 5410 Connecticut Avenue Corporation.

Q What did Mr. Winn state with reference to any agreements he may or may not have received.

MR. BECK: Your Honor, I object on the grounds that it is irrelevant and immaterial to any of the issues in the complaint.

THE COURT: Overruled.

THE WITNESS: Mr. Winn stated that he received a call from Mr. Whiting, that is, Mr. Dinty Whiting, I believe on May 26th, 1959, asking if he would be interested in taking a one-fifth share of the stock of this corporation, of 5410 Connecticut Avenue, that Mr. Whiting's group had an opening for a participant.

Q Now--

A It was basically -- pardon.

THE COURT: Go ahead.

THE WITNESS: It was basically arranged, as I understood, between Mr. Whiting and Mr. Winn that if Mr. Winn could come up with \$20,000 or in that vicinity and was interested he could get into the deal. Mr. Winn was interested and went to Washington, the District of Columbia, and met with Mr. Saunders, that is, Mr. Benjamin Saunders and Mr. Whiting on May 27th.

BY MR. GENN:

Q Now, what you are reciting or have just recited is what Mr. Winn told you on that occasion, is that correct?

A Yes.

Q Did Mr. Winn then proceed to make any reference to what documents he received as a result of the meeting on May 27th?

A He told us that on May 27th -- first, I might mention, he told me that he considered Mr. Whiting as his attorney, and he reposed trust and confidence in Mr. Saunders as well as Mr. Whiting. He told me that on May 27th he gave Mr. Benn his check for \$20,000 and in return he received from Mr. Benn a letter reciting that the check would be held and not negotiated or deposited. I don't believe a period of time was stated, but it was to be held for exchange for four \$5,000 Government bonds, face value \$20,000, that these four bonds were owned and held by Mr. Winn's mother in Brooklyn, New York. May 27 was a Friday, and Mr. Winn told me he went to Brooklyn and had his mother get the bonds and turn them over to him, that he returned to Washington, I believe, on June 2nd, 1959, and at that time delivered the bonds to Mr. Benn and received in exchange at that time an agreement which in effect recited that the \$20,000 in bonds was accepted as a down payment on the purchase of this twenty percent of the stock of 5410, that the \$20,000 check had been redelivered to Mr. Winn, and that Mr. Winn by this means had completed the initial closing of the fifty shares of 5410.

Mr. Winn also told me that--

Q Did you receive a copy or some document in reference to that exchange agreement?

A I saw one copy of the letter of May 27. I saw two copies of the agreement of June 2nd, which you called the exchange agreement. That could have been June 1. In my mind, it is June 2nd.

MR. BECK: Excuse me. Did the witness say the letter of May 27th.

THE WITNESS: Yes. As I remember, it was a one-page letter.

THE COURT: That is right.

THE WITNESS: The June 1 or June 2 document was a two page instrument. The second page was, as I remember it, only signatures, maybe a date and place of signing.

THE COURT: Did Winn show it to you at this meeting, is that what you are saying?

THE WITNESS: Yes, sir, I saw those documents at this meeting.

Mr. Winn told me that he had also received a third document, and he couldn't recall whether it was on June 2nd or June 6th. He was inclined to think it was June 6th. He received a copy of an agreement which he called a supplemental agreement. He told me that a copy of the agreement was in his safe deposit box in Brooklyn, and that he would furnish me a copy of it when he returned north.

He stated that this agreement, in effect, recited that he and the other four purchasers who, as I remember, were Mr. Harry Link and Mr. Betoff and Mr. Pardo and Mr. Whiting, were indemnified against any loss in the transaction by Mr. Benn and further that the five purchasers had the right to sell back to Mr. Benn on or before December 1, 1959, the shares of stock that each had purchased at a profit, and I am not certain whether he told me 25, whether the profit was 25 percent or the price was \$25,000; but as I recall it, the description that

Mr. Winn gave me was that they had the right to sell back to Mr. Benn in that period of approximately six months the stock that they had purchased at a substantial profit, which I think was 25 percent.

BY MR. GENN:

Q Now, you are reciting again, sir, what Mr. Winn had told you at this meeting.

A Yes.

Q Now, did you see any document reflecting the agreement that you have just alluded to?

A No. Mr. Winn told me--

Q Yes.

THE COURT: Let him finish.

BY MR. GENN:

Q Go ahead.

A Mr. Winn told me, as I stated before, that his copy was in the safe deposit box in Brooklyn and that it was his understanding that all other copies were destroyed.

THE COURT: Is that what you call a supplemental agreement? Is that what you called it?

THE WITNESS: Yes, sir.

BY MR. GENN:

Q Did he state how he had information that the supplemental agreement of the other four parties had been destroyed?

A He told me that shortly after June the 6th, 1959, I don't recall whether it was in the first part of June or exactly when, but my impression was it was about the middle of June, he received a call from Mr. Whiting; and Mr. Whiting told Mr. Winn that the other

four purchasers had discussed the matter and had agreed that the best course of action to follow was to destroy this supplemental agreement and all copies; and Mr. Whiting requested that Mr. Winn do so, leaving this as an unrecorded or unmonumented oral agreement.

Mr. Winn stated that he told Whiting that he in fact already had destroyed his copy. Mr. Whiting expressed great relief at this, and the conversation ended on that note.

Winn told me further that in fact he had not destroyed the agreement, but still had it.

* * * *

(Tr. 2044) Q What was the substance of your telephone talk with Mr. Sankin on May the 15th?

A Mr. Sankin still was inquiring as to what had been going on and what was going on and where we headed, and where did he stand, and would we recognize an exercise by him of first refusal rights. And again I was not answering any questions in any way to commit us or to reveal my thinkings or findings or facts or anything to Mr. Sankin. I merely told him that it was premature; that we would have to continue to get into the matter; that I couldn't go any further than that in dealing with him at that time.

I am not certain, but I may have received a call from Paul Dobin that day, too. I believe that was later.

* * * *

(Tr. 2072)

Q That is Plaintiff's Exhibit 19?

[Mr. Nicholson]

A Yes.

Q At the time of that telephone conversation, did you tell Mr. Sankin about this sham transaction that Mr. Garfield had outlined to you?

A I think I have testified before I never told Mr. Sankin about those transactions, or any person associated with Mr. Sankin, until long after this litigation was commenced.

* * * *

PORTIONS OF TESTIMONY

of

ATTORNEY PAUL DOBIN

(Tr. 1442 to 1444)

* * * *

[MR. DOBIN] A Mr. Sankin, myself, Mr. Benn, and Mr. Whiting sat down in the lobby of this apartment house; and Mr. Benn and Mr. Sankin primarily -- I think Mr. Whiting didn't say a word until much later, and I didn't participate, in effect, while the conversation was in the lobby -- they started to talk about the building and the transactions which had presumably occurred between Mr. Benn and Mr. Garfield. Mr. Benn took out of his briefcase certain papers, which I never saw, but which he identified and showed to Mr. Sankin as documents related to this transaction. He didn't leave them with Mr. Sankin. He put them back in his bag.

At some point Mr. Sankin, I would imagine, if I remember correctly, raised the question of his voting rights in connection with stock he owned, and Mr. Benn and Mr. Sankin's voices rose considerably. I was embarrassed, and I suggested that perhaps we ought to move into Mr. Sankin's private office, because it looked like the meeting was going to take some time now; and we moved into Mr. Sankin's private office, the four of us, we were alone; and the conversation continued first about this business of the voting rights. I think I participated more when we got into this private room. Both Mr. Sankin and I told Mr. Benn that Mr. Sankin had certain voting rights in the stock as a result of an agreement with Mr. Garfield.

Mr. Benn said he didn't recognize those rights and my memory is he took out from his briefcase what appeared to be a code. I can't tell whether it was a negotiable instruments law or one of the uniform acts; but he read a portion of that act to us as evidence or argument as to why he wasn't bound by it and didn't have to recognize these rights. And I remember his using the words bona fide purchaser for value; and he said he was such a bona fide purchaser for value. In any event, he said he didn't recognize these rights.

The conversation then turned to the question of the amount which we understood, Mr. Sankin and I understood that Mr. Benn was paying for the purchase he presumably had made from Mr. Garfield.

And Mr. Sankin told Mr. Benn that he thought he had paid much more than the building was worth for his relative share as evidenced by the amount of stock he bought.

Mr. Benn said he agreed that the building was not worth as much as he paid. He told us that he was a wealthy man and that he had a considerable amount of money and especially he had certain money, he said, outside the country; and that as a result of the money that was available to him outside the country, he was able to pay more than the building was worth, if he could ultimately convert his interest into dollars.

And then at some point Mr. Benn offered to sell to Mr. Sankin the interest which he had apparently acquired from Garfield, and he recited the price that he thought he should get for his interest. And my recollection is that for everything that Garfield had sold he wanted some \$500,000, \$480,000.

Q Mr. Dobin, will you state what transpired at that meeting in Mr. Marshall's office on May 28?

A Mr. Benjamin Brown and myself told Marshall that we expected Mr. Garfield to do something about this, pursuant to the agreements he was obligated to deliver the stock or have it delivered to us.

We discussed ways in which this might be brought about, including litigation. Mr. Marshall told us that either he or probably Nicholson -- undoubtedly Nicholson -- had also been thinking about a lawsuit now; and he also told us that Nicholson had started drafting papers and they were supposed to come to the meeting. I am not sure whether they were actually physically there at the beginning or they got there during the morning, a form of a complaint of some kind.

In the process of this conversation, Marshall and Garfield told us that they were trying to rescind certain of the transactions, or all of the transactions they had with Benn.

We couldn't quite understand what they were rescinding, frankly, and we asked questions. At some point, Mr. Sankin got his hands on a draft of a recision agreement. Whether it was turned over to him or there were a lot of papers on the table and he picked one up, I don't know.

I looked at that recision agreement briefly and we started asking more questions, because the documents that we had gotten and the conversation thus far had raised questions in my mind, certainly; and it became known to me for the first time then that Mr. Garfield asserted some interest in 5410 Corporation, to whom we understood

this stock had passed. We wanted to know how that happened.

Garfield and Marshall told us, in effect that the transaction that had occurred between Benn and Garfield had been a sham transaction for the purpose of wiping out Mr. Sankin's voting rights, and that actually the stock was supposed to come back to Mr. Garfield and Mr. Benn was supposed to give it back to him, so that Mr. Garfield would have been in his original position but Mr. Shankin's voting rights would have been wiped out.

We were shocked.

MR. GENN: I have nothing further, if the Court please.

THE COURT: Mr. Seegmiller.

MR. SEEGMILLER: No questions.

* * * *

BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. DEAN
5410 CONNECTICUT AVENUE, N.W.
JOSEPH PARDO

v.

JULIUS SANKIN

Appellants

No. 21957

JAMES T. DEAN

Appellant

v.

JOSEPH A. GARFIELD, et al.

Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED **MAR 17**
~~COT 18~~ 1968

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court should have held that the restrictions on the transferability of the stocks herein were invalid because these restrictions violated the Uniform Stock Transfer Act (Title 28, Secs. 2901, et seq., D. C. Code, 1961 Ed.).

2. Whether the District Court should have held that the restrictions on the transferability of the stocks involved herein were invalid because such restrictions were not marked on the stock certificates or set forth in the Articles of Incorporation as is required by the Uniform Stock Transfer Act (Title 28, Secs. 2901, et seq., D. C. Code, 1961 Ed.).

3. Whether the District Court should have granted appellant's motion for new trial.

4. Whether the District Court erred in failing to give appellant Benn greater latitude on numerous procedural and evidentiary questions in view of his pro se appearance in the District Court, taking into account especially that he was the only defendant who could and would challenge Sankin's claims.

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BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO

Appellants

v.

JULIUS SANKIN

Appellee

No. 21957

JAMES T. BENN

Appellant

v.

JOSEPH A. GARFIELD, et al.

Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

This is an appeal from a consolidated ^{1/} judgment of the United States District Court for the District of Columbia entered January 18, 1968. A timely motion for new trial and for other relief was denied without opinion on February 1, 1968. On February 29, 1968, notices of appeal were filed by James T. Benn and 5410 Connecticut Avenue Corporation, and on March 8, by Joseph Pardo. ^{2/} Jurisdiction in the District Court was conferred by Section 1332, Title 28, U.S.C., which jurisdictional fact was recited in plaintiff's complaint which appears at page of the record. Jurisdiction in this Court is based on Section 1291, Title 28, U.S.C.

1/ Civil Action No. 4002-60 was consolidated with Civil Action No. 1493-59 since, except for the party defendant (Janet Garfield), it involved common questions pending before the Court in James Benn's cross-claim against Joseph Garfield in Civil Action No. 1493-59.

2/ A cross notice of appeal having been filed by Sankin on March 1, 1968, Pardo's appeal was timely moved within the 14-day period specified by Rule 73(a)(3), F.R.C.P.

STATEMENT OF CASE

The record in this case consists of over 8,000 pages of transcript, including proceedings before the Special Master, but in an effort to reduce this appeal to manageable proportions, appellants have limited themselves to narrow but controlling points, and, thus, this statement of the case will be limited to those facts bearing on such issues.

In April of 1956, appellees Julius Sankin (Sankin) and Joseph Garfield (Garfield) acquired a parcel of ground at 5410 Connecticut Avenue, N.W., in the District of Columbia for purposes of constructing thereon an apartment building. Sankin and Garfield are related through marriage--one Herman Mankes (not a party) being Garfield's uncle and Sankin's father-in-law--and have successfully combined their joint interests in an apartment project known as the Livingston Apartments near to the 5410 site. (J.A.34)^{3/}

In August 1957, Sankin and Garfield entered into a written agreement for the purpose of defining their respective rights and obligations in the 5410 property they proposed to develop. That agreement provided that while Garfield was to have a 2/3 interest with respect to the profits and losses and Sankin a 1/3 interest, the latter was to have an equal voice with Garfield in all decisions affecting the undertaking and property. Necessary preliminaries having been resolved, Sankin and Garfield decided to proceed with construction of the apartment building in the spring of 1958. For that purpose, in April 1958, two corporations were incorporated under the laws of

^{3/} References are to the Joint Appendix.

the District of Columbia. Garfield and Sankin, Inc., was created for the purpose of owning and operating the apartment project; Julius Sankin, Inc., was incorporated for the purpose of constructing the building. In the case of each corporation, 100 shares of stock were issued, of which Garfield owned $66 \frac{2}{3}$ shares and Sankin $33 \frac{1}{3}$ shares. (J.A. 34)

By agreements dated May 1, 1958, Garfield and Sankin entered into written stockholders' agreements with respect to each corporation. By the terms of those agreements, Garfield and Sankin had an equal voice in the affairs of each corporation notwithstanding Garfield's ownership of $66 \frac{2}{3}$ compared to Sankin's $33 \frac{1}{3}$ shares. The District Court has found, moreover, that Garfield and Sankin each agreed that he, his heirs and assigns would not dispose of any of his shares without first offering the same to the other. The District Court has also found that although not incorporated in their written May 1, 1958 agreements, Garfield and Sankin contemporaneously orally agreed that, in the event either party wished to dispose of his stock, the other party in exercising his right of first purchase, was to pay the seller either the reasonable value of the stock at the time of purchase or an amount equal to that offered the seller by a bona fide purchaser for value. ^{4/}

(J.A. 34-35)

^{4/} Appellants do not agree with the conclusion of the District Court that the May 1, 1958 agreements created a right of first purchase, but rather, assert that the agreements permit a sale of the party's respective interest to an outsider, provided such sale did not become final and effective until the other party had been given at least 30 days in which to meet the offer of the outsider. That is, Garfield, for example, might sell his stock to an outsider, but the outsider would then be required to sell the stock to Sankin if Sankin made an offer identical as to terms, price, etc. However,

Cont'd

The stock certificates issued by each corporation to Sankin and Garfield set forth no restrictions as to the special voting rights nor notice of the right of first purchase by a stockholder. Counsel for the corporations advised Garfield and Sankin that it was necessary to the validity of the restrictions to include such information on the stock certificates. For reasons of his own, Garfield requested that no such legend be placed on the certificates and Sankin acquiesced in his request. (J.A. 35)

Thereafter, construction of the apartment building was initiated, but it was not long before disagreements arose between Garfield and Sankin, and by late February or early March 1959, Garfield had become dissatisfied with his relations with Sankin. The District Court has found that it was at this time that Garfield consulted with his wife, Janet, to devise a way to recover control in the corporations commensurate with the extent of his stockholdings, and that Janet suggested taking up the problem with appellant Benn. Their plan, the Court has found, was that Benn seemingly independently but actually as Garfield's accomplice, would make an offer to purchase Garfield's interest, at a price so high that Sankin could not possibly meet it, and thus Benn, as an apparent bona fide purchaser but actually as nominee for Garfield, would own Garfield's stock free of the May 1, 1958 restrictions. (J.A. 36)

Appellants maintain that the Court's finding of a fraudulent conspiracy is clearly erroneous for reasons elaborated, infra, and maintain that Benn made a straight-forward offer to purchase. ^{5/}

for purposes of testing the validity of the restrictions on alienation imposed by the May 1, 1958 agreements, this distinction is immaterial and is thus not raised as a point on appeal.

^{5/} It is not material to the question of the validity of the restrictions whether Benn's purchase offer was fraudulent or not.

In any event, by April 7, 1959, all details of the Benn-Garfield transaction had been worked out, and on April 8 they delivered to the Riggs National Bank two non-interest-bearing notes (one in the amount of \$540,000.00, and the other in the amount of \$60,000.00), both due December 1, 1959 representing the purchase price of the stock as agreed upon and Garfield's stock power to 66 2/3 shares of Garfield and Sankin, Inc., stock. Subsequently, Garfield delivered the actual stock certificate. These notes, and the agreements leading up to them were executed by Benn as president pro tem of a corporation to be formed, and on April 10, 1959, 5410 Connecticut Avenue Corporation was formed in the District of Columbia with authority to issue 100 shares of capital stock. (J.A. 36-37)

Thereafter, on April 20, 1959, an agreement was entered into between Benn and Garfield whereby Benn would purchase for \$200,000.00, 66 2/3 shares of Julius Sankin, Inc., and a demand note of 5410 Corporation in the amount of \$200,000.00 was prepared. On April 21, 1959, this note, Garfield's stock power for 66 2/3 shares of Julius Sankin, Inc., and the escrow agreement were similarly delivered in escrow to Riggs National Bank. (J.A. 37) Garfield subsequently delivered his stock certificate for 66 2/3 shares of Julius Sankin, Inc., to the Riggs National Bank.

Also on April 21, Sankin was informed that Benn had purchased Garfield's interests in the two corporations, and on April 24, Garfield resigned as a member of each board and as an officer of each corporation. Benn was then elected to each board and as president of Garfield & Sankin, Inc., and secretary-treasurer of Julius Sankin, Inc. (J.A. 37) .)

The construction of the apartment building continued, but Sankin

became increasingly dissatisfied with relations with his new partner, Benn, and offered to purchase from Garfield 16 2/3 shares of the stock of each corporation, which would result in his owning 50%. Garfield refused to sell except on the exact terms and conditions of his transaction with Benn, taking the position, in effect, that Sankin must buy from Benn. Garfield and Benn both agreed that Sankin could have until May 30 to complete the purchase, that is, to make an offer identical in price and terms to Benn's offer. (J.A. 38)

During this same period of time, relations between Benn and Garfield were extremely hostile and Garfield continued to insist on a clarification of his position. On April 29, Benn gave Garfield the stock certificate of 5410 Corporation duly endorsed to the effect that it was to be held by Garfield as security for payment of the notes which Benn had used to purchase Garfield's interests. (J.A. 38) Benn also sought from Garfield an assignment of monies advanced by Garfield to the corporations, but Garfield refused.

Because of the confused situation between all the parties, Riggs National Bank refused to honor a letter dated April 28, 1959 signed by both Benn and Garfield authorizing the bank to deliver the stock certificates out of escrow. (J.A. 38-39)

On May 4, 1959, Benn suggested to Garfield that Benn be permitted to redeem his \$800,000.00 in notes by assigning to Garfield 2,000 shares of stock of International Timber Company, a Panamanian corporation. Garfield at first refused but finally acquiesced and signed the following documents:

(a) an irrevocable assignment to 5410 Corporation of all of Garfield advances

to the Garfield-Sankin partnership and Garfield and Sankin, Inc.; (b) an exchange agreement substituting 2,000 shares of bearer stock of International Timber Company for the \$800,000.00 in notes of 5410 to Garfield; (c) a joint letter to the Riggs National Bank authorizing the delivery of those notes marked "paid and cancelled" to Benn's attorney; and (d) a paper writing purportedly acknowledging receipt by Garfield of 2,000 shares of the bearer stock of the International Timber Company. (J.A. 39)

The District Court has found that Garfield never received the stock certificate of International Timber Company and has further found that this stock was worth, at most, \$10,000.00. For reasons to be more fully developed, infra, appellants will show that this fact-finding of the District Court is clearly erroneous, being based on totally insufficient and one-sided evidence.

A few days later, on May 6, 1959, Garfield learned that Benn had withdrawn \$24,000.00 from the bank account of Garfield and Sankin, Inc., and resolved to try to rescind his dealings with Benn. He asked his wife to invite Benn to their Florida home and Benn arrived there on May 8. The discussion became so heated between Benn and the Garfields that Mrs. Garfield took possession of Benn's briefcase as a means of forcing him, as she thought, to undo the transaction with her husband. She had been informed that Benn carried all of his papers in his briefcase and she believed that for him to be deprived of it would cause him great concern. She took the briefcase to her brother's home and noted in it, she states, a certificate for 2,000 shares of bearer stock of International Timber Company and two sealed manila envelopes, which she noticed contained currency. She testified, and

the District Court has found that on May 9, she returned to Benn the two sealed envelopes as well as the briefcase and all of its contents except the material which she felt belonged to Garfield. Benn gave her a receipt for the money returned which he claimed amounted to \$120,000.00. (J.A. 40) Appellants disagree with the finding of the District Court that Mrs. Garfield returned all of the money for reasons more fully developed, infra.

There followed a period during which Garfield sought to rescind the transaction with Benn, and Benn continued to furnish Garfield with additional stock powers and certificates in 5410, always subject to the restriction that they were being delivered only as security for payment of Benn's \$800,000.00 in notes. Also at this time, Benn and Sankin had further discussions during which Benn insisted that Sankin was free to purchase the stock at any time provided he purchased it from Benn at the price and on the terms used between Benn and Garfield. After several conversations, Benn offered the Garfield stock to Sankin for \$480,000.00, and when this was refused, offered to buy out Sankin for \$250,000.00. This latter offer was accepted by Sankin, but never consummated by Benn. (J.A. 42)

On May 26, 1959, Sankin entered into a transaction with Garfield essentially identical to Benn's purchase. He executed notes totalling \$800,000.00, but because of adverse claims by 5410 Corporation, Riggs National Bank did not turn over the stock to him either. In entering into the May 26, 1959 agreements, Sankin was purporting to exercise his right of first purchase under the May 1, 1958 agreements. (J.A. 42)

On the same day, May 26, 1959, Benn sold his interest in the 5410

Corporation properties to the five intervenor defendants (of whom appellant Pardo is one), who communicated to Riggs National Bank that Sankin's purported purchase should not be honored until the bank received from Sankin \$800,000.00. (J.A. 42 et seq.)

Unable to induce Riggs National Bank to deliver the stock to him, on May 29, 1959, Sankin instituted this action in the District Court naming 5410 Corporation, Benn, Garfield and five others as defendants. His complaint alleged a conspiracy between all defendants to deprive Sankin of the right of first purchase allegedly conferred upon him by the May 1, 1958 agreement, and it requested the Court to vest the 5410 Corporation stock in him. The District Court found that the May 1, 1958 agreements were valid and enforceable, and that a fraudulent conspiracy had been in existence between Benn and the Garfields to deprive Sankin of his rights. The Court ordered that Sankin be permitted to purchase 2/3 of the stock of Garfield and Sankin, Inc., and Julius Sankin, Inc., for their fair value as of May 26, 1959, and further awarded Sankin punitive damages in the amount of \$30,000.00 against Benn and the Garfields. The fair value of the stocks was determined by a Special Master, after extensive hearings, to be \$376,479.00.

STATEMENT OF POINTS

1. The District Court should have held that the restrictions on the transferability of the stocks herein were invalid because these restrictions violated the Uniform Stock Transfer Act (Title 28, Secs. 2901, et seq., D. C. Code, 1961 Ed.).

2. The District Court should have held that the restrictions on the transferability of the stocks involved herein were invalid because such restrictions were not marked on the stock certificates or set forth in the Articles of Incorporation as is required by the Uniform Stock Transfer Act (Title 28, Secs. 2901, et seq., D. C. Code, 1961 Ed.).

3. The District Court should have granted appellant's motion for new trial.

4. The District Court erred in failing to give appellant Benn greater latitude on numerous procedural and evidentiary questions in view of his pro se appearance in the District Court, taking into account especially that he was the only defendant who could and would challenge Sankin's claims.

SUMMARY OF ARGUMENT

The District Court has concluded that the May 1, 1958 agreements between Garfield and Sankin were valid and enforceable to impose restrictions on the alienation of the Garfield and Sankin, Inc., and Julius Sankin, Inc., stock even though the restrictions were not inscribed on the stock certificates. Appellants contend that this conclusion is an erroneous interpretation of Section 15 of the Uniform Stock Transfer Act (Title 28, Secs. 2901, et seq., D.C. Code, 1961 Ed.), since the better reasoned interpretations of Section 15 make it clear that a restriction on alienation of stock is invalid as against third parties with or without notice of the restriction unless the restriction is properly inscribed on the stock certificate. Thus, Sankin had no rights enforceable against Benn or any other party by the May 1, 1958 agreements, and the stock passed from Garfield to Benn free and clear of all claims of Sankin.

Appellants next argue that even assuming arguendo the validity of the May 1, 1958 agreements, the District Court's fact-findings are based on a distorted view of events since they depend entirely on evidence seriously called into question by the motion for new trial, erroneously denied by the District Court. For example, the motion placed before the District Court evidence which seriously undermined the credibility of Janet Garfield, on whose testimony alone, the Court's fact-findings are almost entirely based. Moreover, central to the District Court's decision is a finding that the International Timber Stock is worthless. Persuasive evidence, not developed at trial, but likewise attached to the motion for new trial, clearly casts

doubt on this fact-finding in regard to International Timber.

Finally, appellants argue that the one party suitably situated to defend this case was Benn, who appeared pro se and unsuccessfully attempted to introduce into evidence much testimony and numerous documents. This testimony and documentary evidence was vital to this case, even if technically inadmissible in the form offered by Benn, but if properly presented would have changed the entire course of this case. Most significant among such items of evidence is the lengthy correspondence between Benn and other persons regarding the nature, extent, and value of the International Timber Company concessions in Surinam. The fact that the heaviest weight of the defense was carried by a pro se litigant has thus resulted in a distorted and incomplete record.

ARGUMENT

I

THE MAY 1, 1958 AGREEMENTS ARE UNENFORCEABLE AGAINST
THIRD PARTIES WITH OR WITHOUT NOTICE OF THE RESTRIC-
TIONS SET FORTH IN THEM.

By their May 1, 1958 agreements in regard to the stock of Garfield and Sankin, Inc., and Julius Sankin, Inc., Garfield and Sankin sought to do two things--first, to confer upon each other equal voting rights notwithstanding their disproportionate stockholdings, and, second, to grant each other a right of first purchase or option so that neither party could sell his stock to an outsider without first offering it to the other or delaying his sale to an outsider to give the other 30 days in which to meet the outside offer. Of these two rights, the latter is the more vital since its validity is central to this case.

Section 15 of the Uniform Stock Transfer Act, which on the relevant date in 1959, was in effect in the District of Columbia as Title 28, Section 2915, of the District of Columbia Code, 1961 Edition, provides as follows:

There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

From this language, it is quite clear that "there shall be no restriction upon the transfer of shares * * * unless * * * the restriction is stated upon the certificate."

The record is unchallenged in this case to the effect that no such

restriction was stated on the certificates here involved, even though Sankin and Garfield were counseled that this was advisable. The District Court holds that Sankin's rights were valid, reaching this result and avoiding the plain language of the statute by its finding that Benn had actual notice of the restriction. The Court reasons that the statutory provision is designed for the protection of the "innocent and unwary." Thus, where there is actual notice of a restriction, the statutory requirements need not be met.

Since there are no District of Columbia authorities on this question, the District Court hinges its view primarily on Doss v. Yingling, 95 Ind.App. 494, 172 N.E. 801 (1930), and Baumohl v. Goldstein, 95 N.J.Eq. 597, 124 A. 118 (1924). In those two cases, it was held that officers of a corporation having knowledge of a private restrictive agreement would not be permitted to enjoy a transfer of the stock solely because there was a failure to comply with the statutory requirements. Not only are these cases directly opposed to numerous cases cited by appellants to the District Court,^{6/} but their impact on construction of Section 15 has been seriously limited by numerous commentators. For example, the editors of ALR 2d in an annotation on this problem appearing at 29 ALR 2d 901 commenting on both Doss and Baumohl, state:

* * * It is doubtful that these cases would be followed except under similar conditions. It seems certain, at

^{6/} Costello v. Farrell, 234 Minn. 453, 48 N.W. 2d 557 (1951), Hopwood v. Topsham Telephone Co., 120 Vt. 97, 132 A.2d 170 (1957), Sorrick v. The Consolidated Telephone Co., 340 Mich. 463, 65 N.W. 2d 713 (1954), Age Pub. Co. v. Becker, 110 Colo. 319, 134 P.2d 205 (1943).

any rate, that it cannot be assumed from these cases that mere knowledge of the restriction will make it effective even though there is lack of compliance with Section 15 of the statute. .

The ALR commentators proceed to point out that in three other sections of the Uniform Stock Transfer Act, the phrase "for value, in good faith, and without notice" is used, and, thus, they conclude its omission from Section 15 was intentional and necessary, making it improper to inject a notice element in interpreting this section.

It is arguable that appellants' construction of the section would produce a harsh and inequitable result in some cases, but it is submitted that the overall policy of Section 15 reflects a greater public necessity than the mere protection of individual rights. This greater public necessity is expressed by the official commentators to Section 8-204 of the Uniform Commercial Code as follows:

Securities dealt in on financial markets are generally assumed to be free of adverse claims (Section 8-301). That assumption should not be lightly negated. Therefore a strict rule as to notice of a restriction on transfer is here imposed. * * *

The significance of this commentary is two-fold. First, it articulates the overriding necessity that securities must be assumed to be free of restrictions unless precise notice procedures are followed. Second, it adverts to the fact that Section 15 of the Uniform Stock Transfer Act has been rephrased in the Uniform Commercial Code by the additions of the words "except against a person with actual knowledge of it." The commentators go on to say that the addition of this language in the Uniform Commercial Code Section reflects

an adoption by the draftsmen of the reasoning in cases such as Baumohl v. Goldstein, supra, and a rejection of contrary holdings, but it appears uncontraverted that prior to the Uniform Commercial Code, Baumohl v. Goldstein and Doss v. Yingling represented the minority and, it is submitted, incorrect view of Section 15. This conclusion is borne out by the following excerpt from Straits Transit, Inc. v. Union Terminal Piers, 370 Mich. 274, 121 N.W. 2d 679 (1963), summarizing the state of the law before the Uniform Commercial Code:

It is conceded that defendants had knowledge of the restriction and it is also clear that the restriction was not endorsed on the stock certificate of plaintiff corporation. The trial judge found the restrictions unenforceable, based upon the Sorricks case, cited above, and also upon the case of Costello v. Farrell, supra. We said in Sorricks, 340 Mich. at p. 469, 65 N.W. 2d at p. 715:

In the instant case those who organized the defendant corporations could have specifically stated the limitations they now seek to enforce in their articles of association which, when filed, would have been notice to the world of such restrictions. At the same time, they could have written limitations in the body of their stock certificate which again would have provided ample notice to all purchasers thereof. We are not unmindful that plaintiff Sorricks already had such notice, but, nevertheless, we are of the opinion that we should not write into the law a limitation on stock transfers contrary to the well accepted understanding of the method of creating such limitations, as is expressed by the legislature in the various provisions of the Uniform Stock Transfer Act and the Michigan General Corporation Act as hereinbefore quoted.

Appellants submit that what the District Court has done here is precisely what the Michigan Court properly refused to do, that is, to write

into the law a limitation contrary to the well accepted understanding of the method of creating limitations on the transfer of stock.

The concept that notice was an immaterial element before the Uniform Commercial Code is an expression of a larger principle clearly enunciated in In re Consolidated Factors Corporation, 46 F.2d 561 (D.C. S.D.N.Y. 1931) where the general proposition in regard to restrictive covenants on personal property is stated as follows:

As a general rule a restrictive covenant on a chattel or other personal property does not follow it into hands of third persons whether such persons have notice of the covenant or not.

The Court then proceeds to discuss Lord Strathcona Steamship Company, Ltd. v. Dominion Coal Company, Ltd., 1926 App.Cas. 108, a Privy Council case, and says:

That case is a rare exception to the usual rule that personal property is free of restrictive covenants even though notice of them is communicated to the purchaser of such property.

Moving to the instant case, it is quite clear that the District Court should have held Sankin's rights of first refusal to be unenforcible for failure to comply with the Act. Benn and, subsequently, the intervenor defendants, as transferees, with or without notice, acquired the stock free and clear of any claims by Sankin. Thus, as of April 1959, the operation, ownership, profits, and control of the 5410 apartment project should have inured to Benn and his transferees, subject always, to Sankin's rights, if any, against Garfield for breach of contract and, against Benn for fraud. This conclusion is totally unrelated to the fact-findings bearing on the issue of a fraudulent conspiracy, which findings will be challenged on the basis of facts developed in this brief.

II

THE DISTRICT COURT ERRED IN DENYING DEFENDANT BENN'S MOTION FOR NEW TRIAL AND THIS DENIAL RENDERS ITS FACT-FINDINGS CLEARLY ERRONEOUS.

After entry of the judgment herein, appellant Benn filed a timely motion for new trial and for other relief under Rule 59, F.R.C.P. This motion was directed primarily towards showing that the findings of fact rendered by the District Court were clearly erroneous, since they were based on incomplete and insufficient evidence.

The first point raised in that motion, a point which is vital to this appeal is the matter of credibility, and, more specifically, the credibility of Janet Garfield. In its opinion, the District Court makes it abundantly clear that only three persons (Joseph Garfield, Janet Garfield and James T. Benn) had knowledge of the alleged conspiracy and, thus, only these persons were competent to testify to the events relating to the conspiracy. The District Court placed no credence whatever in Benn and elected to accept the facts as described by the Garfields. The District Court concedes that Joseph Garfield is a self-confessed witness with an overwhelming stake in this litigation, but the Court concludes that it can believe the Garfields because of the striking impact of Janet Garfield's testimony. 7/

7/ In this connection, it is interesting to note that the District Court's view of the weight to be placed on Janet's testimony changed between the issuance of its oral opinion in 1967 and the final opinion before this Court. In its oral opinion, the District Court placed absolute stress on Janet's credibility to the exclusion of all other witnesses, but in its final opinion, the Court retreated slightly from this opinion and stated that it believes Joseph Garfield in any event, but if there were any doubt, Mrs.

Cont'd

Attached to defendant Benn's motion for new trial was a signed but unsworn statement by Mrs. Garfield repudiating each item of her testimony in the trial of this matter. She begins her statement with an admission that her former testimony was false but given under coercion from her husband. She then proceeds to deny the entire substance of her former testimony. She denies an affair with Benn and asserts that a conspiracy was developed between Sankin and Garfield to terminate Garfield's dealings with Benn. She also intimates that Garfield was given ample opportunity to fully acquaint himself with International Timber before accepting an exchange. In short, her statement reverses the entire tenor of her former testimony. It was conceded in the motion that this repudiating statement had been obtained by Benn, and all the circumstances surrounding its drafting and execution were fully recited in the motion. Most significantly, Mrs. Garfield's commitment to execute the statement and her confirmation of its substance was made before two attorneys in Miami, Florida, one of whom, William B. Rowan, had often represented Benn, and the other, Louis Vernell, represented Mrs. Garfield in her divorce from Mr. Garfield, and the affidavits of these two attorneys were submitted with the motion. Moreover, the authenticity of her signature was supported by the affidavit of a well known handwriting expert.

Benn's motion for new trial also put before the Court other independent evidence relating to Janet Garfield's credibility. Attached to the motion was the deposition of Frederick Silver, an attorney in New York City

Garfield's testimony would finally resolve the question. Without unduly stressing the fact that the Court's recollection of the demeanor of witnesses would have been more reliable in its earlier opinion which was rendered immediately after trial, even at this juncture the credibility of Janet Garfield is central to this case.

who testified that on the night of May 13, 1959, he received an unsolicited telephone call from Janet Garfield who stated that at that time she was holding \$60,000.00 of Benn's money which she intended to retain until Benn would put things right between himself and her husband." She further begged Silver to intercede with Benn to reverse the transaction. The dates are clear in the deposition and are directly contrary to Janet Garfield's testimony in this case that she returned all of the stolen \$120,000.00 to Benn in the afternoon of May 9th. It is uncontraverted that Benn departed Miami in the evening of May 9th and had no further contact with either of the Garfields until the trial of this action. Notwithstanding the sworn testimony of Mr. Silver, an independent party not a witness to this case, 8/ the District Court refused to grant the motion for new trial. It should also be noted that Silver's testimony exactly corresponds with Benn's proffer concerning it as described by the District Court at page 84 of the Opinion. In his motion, Benn did not urge the District Court to reverse itself but merely asked that further testimony, if necessary by deposition, be obtained from Janet Garfield to clarify these discrepancies. This, the District Court denied, with the result that its entire fact-finding on the conspiracy aspect of this case is based on testimony, the veracity of which has been considerably called into question.

Benn's motion for new trial also presented important evidence

8 / The deposition in question was taken pursuant to an order of the Tax Court, since the loss of the \$60,000.00 not returned was claimed as a theft loss on Benn's 1959 income tax return but disallowed by the Commissioner.

bearing on the issue of the value of the International Timber stock. Vital to the District Court's opinion is its finding that no property of value passed between Benn and Garfield when Benn purchased the stock of Garfield and Sankin, Inc., and Julius Sankin, Inc. This conclusion the District Court supports by its finding that the International Timber stock was worth at most \$10,000.00. Contained in Benn's motion for new trial were excerpts from the testimony of one Joe Harris in United States v. Charles Darwin Brown and M. Thomas Kent, a criminal case tried before Judge Keech of this District Court, in 1965 and recently before this Court on appeal, but as yet not officially reported. According to Harris's testimony, the value of these concessions, which were identified in the testimony as being the concessions which Benn had owned (Tr. 1067-1071)^{9/} was over \$2,000,000.00 (Tr. 1330-1334). An annual profit of \$175,000.00 from operating the concession Harris considered low (Tr. 1222-1224). Once again, Benn did not argue that the District Court should entirely reverse its former position solely on the basis of his motion but rather urged that the record should be reopened and further testimony taken in light of the material attached to his motion for new trial. Appellants submit that denial of the motion was error as a result of which the District Court's vital fact-finding in regard to the International Timber stock is rendered clearly erroneous.

All of the above outlined points together with the persuasive

^{9/} References are to the Transcript in United States v. Charles Darwin Brown and M. Thomas Kent.

supporting documents, were submitted to the District Court in Benn's motion for new trial. As indicated above, his demands were modest; he did not seek or expect the Court to reverse itself solely on the basis of this evidence, but it was argued and appellants here submit that these papers cast sufficient doubt on the credibility of witnesses and the other bases of the Court's findings to make them clearly erroneous. It is true that the case was at that time eight years old and that all concerned felt that it should be disposed of but nonetheless, more effective and less time-consuming results might have been achieved if the record had been reopened for the purposes specified in the motion.

III

THE DISTRICT COURT ERRED IN FAILING TO GIVE BENN GREATER LEEWAY ON PROCEDURAL AND EVIDENTIARY QUESTIONS IN VIEW OF HIS PRO SE APPEARANCE.

This case consumed 41 days of trial before the District judge, during all of which appellant Benn appeared pro se. As indicated above, he was one of the only persons who could attest to the facts relating to the conspiracy and was the only person who could defend the position of all the defendants and intervenors against the claims of Sankin as supported by the judicial admissions of Garfield. Throughout the proceedings, Benn failed to create a proper record, not from lack of evidence, but because of his unfamiliarity with rules of evidence and procedure.

On the vital point of the value of the International Timber stock, Benn attempted to introduce over 100 documents consisting mostly of

correspondence, which would show that the timber concessions existed in Surinam with the sanction of the government, that these concessions consisted of vast quantities of merchantable timber and that they belonged to corporations, including International Timber, controlled by Benn. For example, on the 38th day of trial, Benn offered 107 documents to be marked for identification. (Tr. 5305-5311.) Of these, only 16 were admitted in evidence. (Tr. 5314, 5316, 5317, 5328, 5331, 5347, 5349, 5352, 5354, 5361.) Exhibits numbered 20 through 57 were entirely excluded, though they consisted of such items as correspondence between Benn and representatives of the Surinamese government regarding the timber concessions and agreements between Benn and the same Joe Harris whose testimony in United States v. Charles Darwin Brown and M. Thomas Kent has been outlined, supra. Most of these documents were excluded primarily because the author or some other competent person did not appear to identify the letter or paper in question. Yet, these papers could have changed the entire course of this litigation by showing that Benn gave up valuable property in exchange for the Garfield interests.

Appellants do not contend that the pro se appearance, taken alone, would constitute a basis for reversing or remanding this case. They do argue, however, that taken in conjunction with all the other weaknesses in the record raised hereinabove, there is ample justification for this Court to vacate the judgment and to order a new trial, with all parties fully and fairly represented.

Lengthy though this brief is, appellants have attempted to limit themselves to controlling issues. They have not raised points such as whether

Garfield, as one of the alleged conspirators, can be heard to testify against his alleged co-conspirator after termination of the conspiracy. There are many cases that say that he cannot. Nor is the matter raised of the effect of Sankin's offer to buy only 16 2/3% of the stock of the corporations, a clear departure from the terms of his option privileges. These points are only two of numerous others which would undermine the conclusiveness of the District Court's opinion, but appellants believe that the points elaborated in this brief are sufficient to justify reversing and remanding this case.

CONCLUSION

For the foregoing reasons, the judgment of the District Court in these consolidated appeals should be vacated and the cases remanded.

Respectfully submitted

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Attorney for Appellant Benn

Bernard S. Cohen
Attorney for Appellant 5410 Connecticut
Avenue Corporation

Joseph Pardo
Pro Se

CERTIFICATE

I hereby certify that two (2) copies of this brief
were mailed to counsel for all parties and the pro se party this
10th day of January, 1969.


John Glandon Davies

SHEET OF APPELLATE JUDGMENT IN NO. 21987

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21985, 21989 and 22017

JAMES T. SPINN
5410 CONNOR ROAD NORTH CORPORATION
NORTH W. PARK

Appellant.

v.

JULIUS SACK INC.

Appellee.

No. 21987

JAMES T. SPINN

Appellant.

v.

JOSEPH A. GARFIELD JR.

Appellee.

Appeal from a Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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(i)

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH H. PARDO,

Appellants,

v.

JULIUS SANKIN,

Appellee.

No. 21957

JAMES T. BENN,

Appellant,

v.

JOSEPH A. GARFIELD, et al,

Appellees.

BRIEF OF APPELLEE JOSEPH GARFIELD IN NO. 21957

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Is the appellee Joseph A. Garfield a proper party defendant in this appeal Number 21,597, which is an appeal from the judgment entered in Civil

Action No. 4002-60 in the United States District Court for the District of Columbia, when in fact said appellee Joseph A. Garfield was not a party either plaintiff or defendant in the aforesaid civil action in the court below?

2. Are the findings of fact and the judgment of the trial court supported by substantial evidence?

3. Is evidence known to the appellant Benn for nine years "newly discovered" so as to support a motion for new trial?

4. Is the unsworn statement of a party partially attacking her credibility "newly discovered evidence" so as to support a motion for a new trial?

5. Did the District Court err in failing to give appellant Benn as a party plaintiff greater latitude on numerous procedural and evidentially questions in view of his pro se appearance?

This case has not previously been before this court

COUNTER-STATEMENT OF THE CASE

This appeal by James T. Benn is from the adverse judgment of the United States District Court for the District of Columbia sitting without a jury in Civil Action 4002-60. Said civil action was brought by appellant Benn as the sole plaintiff against Janet Garfield as the sole defendant and alleged the theft by Janet Garfield of \$120,000 in cash from appellant Benn and the return of only \$60,000 thereof. Judgment was demanded against Janet Garfield in the sum of \$60,000 (Annexed hereto as Appendix A). Appellant Benn prior to the filing of said civil action had, on November 18, 1960, in civil action 1493-59, filed a cross-claim against appellee Joseph A. Garfield averring that the said Joseph A. Garfield had stolen \$120,000 in cash from Benn's briefcase and had only returned \$60,000 thereof and demanded judgment against the said Joseph A. Garfield in the sum of \$60,000 (Vol 1 J.A. 143-145). Upon motion of appellant Benn, the aforesaid cross-claim against Joseph A. Garfield and civil action 4002-60 against Janet Garfield were consolidated for trial (Vol 1 J.A. 146).

At the trial of the consolidated civil actions (1493-59 and 4002-60), the trial court tried separately the aforesaid cross-claim by Benn against Joseph A. Garfield and the consolidated civil action against Janet Garfield after all other issues had been tried and disposed of and after counsel for all other parties had been relieved of the necessity of remaining in the courtroom. At the opening of the trial on the said cross-claim and consolidated civil action, counsel for Joseph A. Garfield offered to stipulate with appellant Benn that all testimony theretofore taken in the lengthy trial be admitted for the purposes of the trial of the cross-claim and consolidated civil action. This stipulation was rejected by appellant Benn and the Court thereupon proceeded to take the testimony as offered.

The said consolidated trial by Benn consumed four full days of trial *(Tr. 5391 - 5696) during which time Benn testified at length in his own behalf; called Joseph Garfield and Janet Garfield as adverse witnesses, introduced in evidence portions of the depositions of Downey, Link, Whiting, Nicholson, Janet Garfield and Joseph Garfield, and called Joseph Garfield and Julius Sankin as rebuttal witnesses. Throughout this entire four-day trial the court most patiently dealt with Benn's difficulties in presenting his case and assisted him in this regard on numerous occasions.

The findings of the trial court, all amply supported by the testimony, are as follows: [*]

"It was on May 6, 1959 that Garfield learned for the first time (from his uncle, Herman Mankes) that Benn had on April 24 withdrawn \$24,000 from Garfield and Sankin, Inc. as a payment on account of Garfield's

* Citations to the trial transcript.

[*] The findings are quoted directly from the 100 page written opinion of the court with citations to the record inserted by counsel.

advances. (Tr. 5518-5521.) Garfield told his wife, Janet, of that withdrawal and she communicated with Benn who was in Washington and asked him to come to Coral Gables, Florida. (Tr. 5404.) At that time she and Benn were still intending to be married, but before that event she wanted Benn to return to her husband all that Benn had taken from him, including the \$24,000.00 and Garfield's files and cancelled checks which had been given to Benn and which the latter had never returned although he had on several occasions promised Garfield he would do so. (Tr. 5407, 5399, 5404, 5406, 5407, 5536.)

"Benn arrived at the Garfield's Coral Gables home on May 8 and he remained there until May 9. While there he denied receiving the \$24,000.00 from Garfield and Sankin, Inc. (Tr. 5407, 5408.) During this period of time there was much acrimonious discussion and among other things Garfield learned for the first time of the relationship between Benn and Janet Garfield. (Tr. 5519.) While Benn was at the Garfield home, Janet Garfield took his large briefcase to her brother's home. (Tr. 5398, 5399, 5400.) She noted, but did not take, a certificate for 2000 shares of bearer stock of International Timber Company. (Tr. 5429.) There were also in the briefcase two Manila sealed envelopes the corner of one which she tore and noted that it contained currency. (Tr. 5416.) On May 9 she returned to Benn the two sealed envelopes as well as the briefcase and all of its contents except the material which belonged to Garfield. (Tr. 5450, 5464, 5462, 5540, 5541.) Benn gave her a receipt for the money returned which he claimed amounted to \$120,000.00. On the same day and before the return to him of his property, Benn gave Garfield another certificate for 100 shares of 5410 stock. (Benn Exhibit 122, Tr. 5460.)

"VI *Benn's Cross Claim against Joseph Garfield,*
(Civil Action 1493-59)
Benn's Complaint Against Janet Garfield,
(Civil Action 4002-60)

"In his answer to Sankin's complaint in Civil Action 1493-59, Benn asserted a cross-claim against Joseph Garfield through which he seeks to recover \$60,000.00 which he alleges was stolen from him by Garfield. (Vol 1 J.A. 143-145.)

"By his complaint filed in Civil Action 4002-60, Benn asserts a claim against Janet Garfield for \$60,000.00 which he alleges she stole from him. (Annexed hereto as Appendix A.)

"On motion of Benn the cross-claim and complaint were consolidated for trial. (Vol 1 J.A. 146.)

"I have heretofore found as a fact that Benn had had returned to him by Janet Garfield the entire sum of money which was in his briefcase that she took on May 8, 1959. The credible evidence on which that finding is based shows that on May 5 or May 6, 1959, Herman Mankes, while in Miami, informed Garfield that Benn had taken \$24,000.00 from the Garfield apartment enterprise. (Tr. 5518-5521.) On May 7, Garfield called Benn, who was then in Washington, and charged him with taking the money. (Tr. 5518.) Benn denied the theft. (Tr. 5518.) Garfield also told his wife of what Mankes had advised him. Janet Garfield then called Benn and asked him to come to Florida. (Tr. 5404.)

"On May 8, Benn arrived by plane about 2 P.M. Janet Garfield met Benn at the airport and the two of them drove in separate cars to Garfield's home in Coral Gables, both arriving at the same time. (Tr. 5412.) At the Garfield home, Benn was again charged with the theft which he denied. (Tr. 5520.) Benn, when asked by Garfield if he had brought with him Garfield's cancelled checks, which, according to Garfield, evidenced his advances to the apartment enterprise, stated that they were in Washington. (Tr. 5427, 5428.) It was during this conversation that Benn and Janet Garfield revealed the affair in which they had been involved. (Tr. 5519.)

"About 4 P.M. on May 8, Janet Garfield took Benn's briefcase, which she believed contained Garfield's checks and files, and drove to her brother's home. (Tr. 5398-5401.) While there, she was advised in a telephone conversation with Garfield, that Benn claimed there was \$200,000.00 in currency in the briefcase. (Tr. 5415-5421.) In disbelief, Janet Garfield looked into the briefcase and found two Manila envelopes sealed with scotch tape. She tore the corner of one envelope and noted that it contained currency. (Tr. 5416.) She did not look into the other envelope but assumed it also contained currency in view of Benn's statement to her husband. (Tr. 5416.) She at no time ever removed the currency; in fact she never opened either envelope. (Tr. 5416.) She at no time counted the money and never knew the total amount. (Tr. 5416.) (Benn later asserted the money totalled \$120,000.00, \$60,000.00 in each envelope.) Janet Garfield, after secreting the briefcase and its contents in her brother's home, returned to her own home about 11 P.M. (Tr. 5416.) Between that hour and 4 A.M. on May 9, Benn and the two Garfields entered into extended discussion concerning the return of Benn's briefcase to him and the return to Garfield by Benn of Garfield's papers as well as the \$24,000. The Garfields also demanded that Benn rescind the fraudulent transaction in which he and Garfield had been engaged. (Tr. 5427-5429.)

"Later in the morning of May 9 the three continued the discussion of the evening before. (Tr. 5430, 5431.) About 2 P.M. Benn called the Coral Gables police and charged the Garfields with robbing him. (Tr. 5436.) The police, after investigating the matter, took no action, leaving it instead to the parties to work out. The police, however, were forcibly removing Benn from the Garfield home until Janet Garfield prevailed upon them to let Benn return. (Tr. 5437-5439.)

"Following the departure of the police and further discussions, Benn offered to give Garfield a certificate for 100 shares of 5410 stock in order

that Garfield might possess evidence of ownership of the corporation. Benn and Garfield went to a public stenographer at the Columbus Hotel and Janet Garfield drove to her brother's home where she picked up the briefcase. (Tr. 5440-5442.) She then took it to her own home and took out of it Garfield's papers and checks and one Manila envelope. (Tr. 5442.) After depositing that material in the attic of her home she drove to the Columbus Hotel to meet her husband and Benn. (Tr. 5442.) She took with her Benn's briefcase and the remaining contents; that is the second Manila envelope and the papers which did not belong to Garfield. When Janet Garfield arrived at the hotel Benn had, or was in the process of endorsing a restricted certificate for 100 shares of 5410's stock to Garfield and having Garfield sign a letter to Riggs Bank. (Tr. 5443, 5448.) When Janet Garfield saw the letter she took it from Benn and tore it up so that it could not be mailed as she considered it a further instrument of Benn's fraud. (Tr. 5444, 5446, 5447.) At the hotel, she gave Benn his briefcase and contents, including the one taped envelope. (Tr. 5443.)

"Benn and the two Garfields then returned to the Garfield home where Benn made out a receipt to Janet Garfield for the returned briefcase and its contents, including \$120,000.00. At that time, Janet Garfield returned the second taped envelope. Thus Benn had returned to him by Janet Garfield the money for which he sues here; money which Garfield at no time had. (Tr. 5455, 5432, 5541, 5645.)

"I reach this conclusion and make these findings on the credible evidence. I find Benn's testimony unworthy of being credited.

"Benn testified that he was asked to travel to Florida on May 8, 1959 by Janet Garfield to help her and her husband who were being harrassed by Mankes; (Tr. 5664-5665-5667) that when he arrived he was told that Mankes had advised Garfield that unless Benn signed the minutes of the annual meeting of Garfield and Sankin, Inc. and Julius Sankin, Inc. and the Federal cor-

poration income tax returns for the year ending February 28, 1959, Mankes would work economic damage on his nephew Garfield. According to Benn he was unwilling to sign those documents without verification of large expenditures of corporate funds. And since he would not sign as an officer of the Garfield apartment corporation, Benn contends his briefcase and contents were stolen from him. He admits that after he endorsed the May 9, 1959 restricted stock certificate for 100 shares of 5410 stock to Garfield, one envelope containing \$60,000.00 was returned to him. However, he claims that he has never had returned to him the remaining \$60,000.00 because of his continuous refusal to sign the minutes and tax returns. The receipt, which he acknowledges making to Janet Garfield, he claims was the result of his being coerced by the Garfields.

"The evidence of record shows Benn's contention to be incredible. Sankin testified that not only was Benn not asked to sign the corporations' minutes of the meetings of stockholders but that there were in fact no annual meetings held at any time from the organization date of the two corporations in May, 1958 to the date Sankin testified in this case. (Tr. 5952, 5956.) The by-laws of Garfield and Sankin, Inc. and Julius Sankin, Inc. provide that "[a]nnual meetings of shareholders, commencing with the year 1959, shall be held on the second Tuesday of April, if not a legal holiday, and if a legal holiday, then on the next secular day following * * *." In the case of each corporation the minutes of an April 30, 1959 meeting of the board of directors show that the annual meeting of stockholders was set for June 19, 1959. This was done, according to Sankin, in order that such meetings would be held after his first purchase rights had expired. (Tr. 59-57.) The April 30, 1959 minutes show that Benn was present at the board meeting of each corporation and that he signed those minutes.

"Sankin also testified that Saunders, Benn's tax counsel as well as secretary-counsel for 5410, stated on or about May 7, 1959, that Benn would not

sign the income tax returns for the corporate years ending February 28, 1959 because Benn knew nothing of the corporations' operations for that period. Being so advised the accountant for Garfield and Sankin, Inc. and Julius Sankin, Inc. obtained an extension of time for filing the returns. (Tr. 5969-5970.) Thus on May 8 and May 9, 1959, when Benn was in Florida, there was no problem with respect to those returns.

"Joseph Garfield never having had any of Benn's claimed \$120,000 (Tr. 5544, 5545, 5915, 5917, 5400, 5779, 5780, 5432, 5433) and Janet Garfield having returned it to Benn (Benn Exhibit 122), the cross-claim against Garfield and complaint against Janet Garfield will be dismissed."

From the time he was served with process Benn was represented by able counsel, David Bastian, Esquire, a member of the bar of this court. When he withdrew shortly before the trial, Benn was represented by Joseph Lyman, Esquire, experienced trial counsel and also a member of the bar of this court. Benn only proceeded *pro se* after a full warning by the trial court and following the assurance of the court that Mr. Lyman would only be permitted to withdraw if Benn consented. Thereupon Benn gave his consent and proceeded *pro se*. (Vol 1 J.A. 258, 259.)

A R G U M E N T *

I

**Joseph A. Garfield is Not a Proper
Party Appellee**

The mere statement of the facts shows conclusively that Joseph A. Garfield is not a proper party to this appeal. He was a cross defendant on a cross-claim filed by appellant Benn in Civil Action 1493-59 in the court below. (Vol 1 J.A. 143-145.) He was not a party to Civil Action 4002-60, an independent action brought by appellant Benn against Janet Garfield. (Annexed hereto as Appendix A.) This appeal (Number 21957) is an appeal by Benn from the adverse judgment entered by the trial court in Civil Action 4002-60. (Vol 1 J.A. 140B) Since Joseph A. Garfield was not a party in Civil Action 4002-60 it would appear to be self-evident that he is not a party to this appeal and that the appeal as to him should be summarily dismissed. Logic and common sense dictate no alternative.

In conclusion, it is submitted that this court does not have jurisdiction over Joseph A. Garfield.

II

**The Findings and Judgment of the
Trial Court are Amply Supported
by Substantial Evidence**

The findings and hence the judgment of the trial court in Civil Action 1493-59 on Benn's cross-claim against Joseph A. Garfield are amply supported by the evidence as is fully shown by the citations to the transcript

* In view of the brevity of the argument, it is believed that any summary of argument would be wholly redundant and would serve no useful purpose. Hence the summary has been omitted.

inserted in the court's written findings as set forth herein as part of the counter-statement of the case by Joseph A. Garfield. The trial court had the benefit of observing the conduct and demeanor of the live witnesses and found that "Benn's testimony [was] unworthy of being credited." Benn's testimony was the sole evidence in support of his claim for \$60,000 and his testimony was sharply contradicted by the testimony of Joseph A. Garfield, Janet Garfield, Julius Sankin and the written exhibits introduced as evidence. Where the findings and judgment of the trial court are fully supported by the evidence, and appellant Benn does not appear to seriously question this fact, such findings and judgment should not be reversed on appeal.

III

Benn's Motion for New Trial Was Properly Denied

Benn filed a motion for new trial based upon "newly discovered evidence" pursuant to Rule 59 of the Federal Rules of Civil Procedure. This so-called newly discovered evidence consisted of (a) the deposition of Frederick Silver, and (b) the unsworn statement of Janet Garfield.

As to the deposition of Frederick Silver, which was taken in another proceeding, this testimony shows that he was Benn's attorney in 1959 and as his attorney informed Benn of a conversation he had had with Janet Garfield. Thereafter, Silver prepared at Benn's request and gave to Benn on June 5, 1959 an affidavit with regard to the purported conversation. Thus, it is eminently clear that Benn was fully aware of Silver's testimony as early as June 5, 1959. The motion for new trial was filed on January 29, 1968, almost nine years later and any claim that Silver's testimony is newly discovered is a blatant affront to the court.

The statement of Janet Garfield was prepared by Benn who obtained

Janet Garfield's signature at a time when she was ill and under great emotional stress. She steadfastly refused to swear to such statement despite Benn's best efforts to obtain a *jurat*. It is at best an attack on Janet Garfield's credibility and does not in any material way factually alter the evidence with regard to Benn's \$60,000 claim against Joseph A. Garfield.

It is of importance to note that Silver's deposition and Janet Garfield's unsworn statement are in direct conflict with regard to one of the vital elements in the case, namely, the relationship between Janet Garfield and Benn.

The standard set by the courts for the granting of a motion for new trial on the grounds of newly discovered evidence is enunciated clearly in *Marshall's U.S. Auto Supply v. Cashman* (CCA 10th, 1940), 111 F. 2d 140:

"A motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that it is of such character that on a new trial such evidence will probably produce a different result."

Not one of the criteria set forth above was met by Benn's motion for new trial and said motion was properly denied by the trial court.

IV

Benn's Election to Proceed *pro se* is Not Grounds for a New Trial

The trial court with the proverbial patience of Job time and again aided, assisted and instructed Benn in the presentation of his case as a party plaintiff seeking a \$60,000 judgment against Joseph A. Garfield. On numerous occasions the Court reviewed for Benn the evidentiary record to date. (Tr. 5434, 5435, 5446, 5458, 5573, 5640-5643, 5958-5959, 5960-5961, 5966-

5968, 5984.)

The court reframed questions improperly put by Benn and on occasions propounded a whole series of questions on his behalf. (Tr. 5463, 5480, 5484, 5485, 5487, 5534, 5536, 5547, 5548 & 5985.) The court assisted Benn on numerous occasions in his examination of witnesses. (Tr. 5417, 5418, 5431, 5463, 5480, 5484, 5487, 5547, 5552, 5559, 5562, 5564, and 5573A.) The court further instructed Benn in detail on various procedural matters throughout the course of the four-day trial. (Tr. 5494, 5531, 5561, 5567, 5701 and 5710.) The court to assist Benn in the presentation of his case sought and obtained for him a stipulation from defendants' counsel greatly facilitating his proof (Tr. 5523). All of the above assistance to Benn is in addition to innumerable instructions given to him by the trial court in two months of trial preceding this action.

Benn, as plaintiff in the court below seeking a judgment of \$60,000 and electing to proceed *pro se* after appropriate warning by the court and having been the recipient of utmost courtesy and assistance from the trial court, cannot now use his *pro se* appearance as a ground for reversal on appeal.

V

CONCLUSION

Appellant Benn has wholly failed to state any just ground for reversal or for remand for a new trial and has not designated as part of an appendix any testimony or exhibits illustrative of any errors in the trial. Under these circumstances, appellee Joseph A. Garfield has refrained from designating large portions of the transcript for printing in the joint appendix and all citations are to the trial transcript pages.

Not only has Benn failed to cite any error in the trial proceedings but

it is again submitted that this court lacks jurisdiction over appellee Joseph A. Garfield and that the appeal should be summarily dismissed.

Respectfully submitted,

Benj. W. Dulany
822 Southern Building
Washington, D.C. 20005
*Attorney for Appellee
Joseph A. Garfield in
Appeal No. 21957*

DOUGLAS, OBEAR & CAMPBELL
Of Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES T. BENN
7820 Southwest 112th Street
Miami, Florida,

Plaintiff,

v.

JANET GARFIELD
6510 Grenada Boulevard
Coral Gables, Florida,

SERVE AT: Statler Hotel, Rm. 622,
16th and "K" Streets, N.W.
Washington, D.C.,

Defendant.

Civil Action

No. 4002-60

Filed December 6, 1960

COMPLAINT OF JAMES T. BENN
(Money Due)

The plaintiff, James T. Benn, respectfully shows unto this Court as follows:

1. The Court has jurisdiction of this cause, the amount in controversy herein being in excess of \$3,000.00, exclusive of costs and interest.
2. The plaintiff, James T. Benn, is a citizen of the United States and a resident of the State of Florida; the defendant, Janet Garfield, is a citizen of the United States and a resident of the State of Florida.
3. Plaintiff sues defendant for that on or about May 8, 1959, while as an invited guest in the home of the defendant Janet Garfield and her husband,

one Joseph A. Garfield, located in Coral Gables, Florida, a brief case belonging to this plaintiff and containing, *inter alia*, \$120,000.00 in cash, was stolen from the plaintiff by the said defendant Janet Garfield and her said husband.

4. That on or about May 9, 1959, the said defendant Janet Garfield and her said husband returned to this plaintiff the sum of \$60,000.00.

5. Although requested to do so by the plaintiff, the said defendant Janet Garfield and her said husband have failed and refused to return to this plaintiff the balance of the monies taken from him as hereinbefore set forth, and there is now due this plaintiff from the said defendant Janet Garfield the sum of \$60,000.00.

WHEREFORE, the plaintiff James T. Benn demands judgment against the defendant Janet Garfield in the sum of \$60,000.00, with interest from May 8, 1959, and the costs of this action.

/s/ James T. Benn

MUNTER, ADAMS, THOMSON & BASTIAN

By: /s/ Davis C. Bastian
866 National Press Building
Washington 4, D. C.
NAtional 8-0055
Attorney for Plaintiff
James T. Benn.

DISTRICT OF COLUMBIA, ss:

James T. Benn, being first duly sworn, on oath deposes and says: I have read the foregoing complaint subscribed by me and know the contents thereof;

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the matters and things set forth therein are true as I verily believe; the defendant Janet Garfield is justly indebted to me in the sum of \$60,000.00, as set forth hereinabove.

/s/ James T. Benn

Subscribed and sworn to before me this 6th day of December, 1960.

/s/ Marjorie Young
Notary Public, D. C.

My Commission Expires Feb. 14, 1963.

BRIEF OF APPELLEE JULIUS SANKIN

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037, and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
United States Court of Appeals for the District of Columbia Circuit JOSEPH PARDO
Appellants

v.

FILED JAN 14 1939

JULIUS SANKIN

Appellee

Nathan J. Paulson
CLERK

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Of Counsel:

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Julius Sankin

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- * Denotes cases upon which appellee Sankin primarily relies.
Excluded from foregoing for reasons stated in the Brief are
those cited in Appendix to Appellee's Brief page J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037, and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO
Appellants

v.

JULIUS SANKIN
Appellee

BRIEF OF APPELLEE SANKIN

I. COUNTERSTATEMENT OF ISSUES

1. Does Section 15 of the Uniform Stock Transfer Act (D.C. Code Title 28-1915), requiring stock transfer restrictions to appear on the share certificates, apply to private shareholder agreements at all?

2. If Section 15 of the Uniform Stock Transfer Act applies to restrictions upon stock transfers appearing in share-

holder agreements, does that Section render the agreement at bar, granting first purchase rights, invalid as to persons who not only have actual notice of the agreed rights, but who also in fact participated in a fraudulent conspiracy to use the law itself to perpetrate the fraud?

3. If Section 15 applies to the first purchase rights in this case, as they appear in the shareholder's agreement, and if that Section declares that agreement invalid as to all persons, because the restrictions were not placed upon the face of the shareholder's certificate, and if, as a result, that very invalidity reaches to the fraudulent wrongdoers in this case, will a Court of Equity give affirmative relief, by virtue of either ordering the transfer of the shares on the books of the corporation to the name of those wrongdoers, or ordering Mr. Sankin's payment for the shares should be made to them?

4. Did the trial Court commit error or abuse its discretion in denying the Motion for New Trial, filed by the defendant Benn, where the alleged information involved was known and in existence for at least six months before the final decision or the Motion was filed, where that "information" did

not contradict the fraud of the appellants, Benn-5410-Pardo, where it purports to state facts contrary to express stipulations and concessions of counsel, and where it is not competent in any event ?

5. Did the Court commit error or abuse its discretion in sustaining objections to hearsay documents proffered by appellant Benn, pro se, (1) where other appellants made no attempt to proffer the same documents and their interests were stronger than Benn; (2) where the alleged "documents" contradicted express testimony from Mr. Benn himself; and (3) where these appellants do not show through their present counsel how and under what theory the "documents" are admissible in any event.

Statement under this Court's Rule 8(d)

The present case has not been before this Court. There were previous interlocutory proceedings in numbers 15248 and 19770 involving the same parties but neither relate to the issues now on this appeal.

II. COUNTERSTATEMENT OF THE CASE

1. Nature Of The Case, And Proceedings And Disposition Below

This action began in May of 1959 when Julius Sankin, the plaintiff below, filed a declaratory suit, sounding in fraud. It sought to set aside certain purported agreements, ostensibly made with third persons by his co-shareholder Joseph Garfield, and which appeared to violate first purchase and voting rights that

Mr. Sankin possessed in earlier agreements made with Mr. Garfield, at the time of the formation of the two closed corporations in which both Mr. Sankin and Mr. Garfield were sole shareholders. Those corporations were Garfield and Sankin, Inc. and Julius Sankin, Inc.

Among the defendants in the suit were Mr. Garfield and the alleged participants in the fraudulent conspiracy, appellants James Benn, 5410 Connecticut Avenue Corporation and Joseph Pardo, an alleged shareholder in 5410.

Mr. Garfield made a full judicial admission of his part in the fraud upon Mr. Sankin and requested that equity be done. Mr. Sankin therefore sought, among other things, to purchase Mr. Garfield's interests at a reasonable or fair market value rather than at the fictitious and fraudulent price of \$800,000.00 which the Garfield-Benn-5410 conspiracy required of him in order to exercise his first purchase rights.

A non-jury trial was held before Judge William B. Jones in October of 1963, on the eighth day of which, at the request of certain defendants, a mistrial was granted. Approximately a year later, in October of 1964, it resumed before Judge Jones; the previous testimony was admitted; and ultimately, in July of 1965, the trial Court rendered a finding for Mr. Sankin. In doing so, the Court ruled that the fraudulent schemes were clearly and

convincingly shown, that Mr. Sankin's shareholder agreements and rights were fair, reasonable, valid and enforceable, and that in accordance with the agreements, he should be permitted to purchase the Garfield shares from Mr. Garfield for their reasonable value, in an amount to be determined in a Master's Proceeding.

In July of 1967 the Master found the reasonable value of the Garfield interests to be \$376,479.00, reflecting a fraud of some \$423,531.00.

The Court adopted that Master's finding as the price Mr. Sankin must pay. It also granted him a judgment of \$30,000.00 for punitive damages against Mr. Garfield, Mr. Benn and 5410. Its detailed Findings and Conclusions appear in its Opinion, now reported. Sankin v. 5410 Connecticut Avenue Corporation et. al. 281 F.Supp. 524 (1968).

In accordance with the Court's ruling, Mr. Sankin in fact paid the sum of \$376,479.00 to the Court.

And Mr. Garfield accepted it, depositing his shares for Mr. Sankin at the same time.

The punitive damage judgment against Mr. Garfield, Mr. Benn and 5410 remains in force and is still unsatisfied.

Neither Mr. Sankin nor Mr. Garfield, the original sole shareholders of the two corporations involved, have appealed the lower Court's decision to this Court.

The only appellants are Mr..Benn, 5410 and Joseph Pardo, a purported shareholder in 5410.

2. The Record Below

This record consists of more than 8,000 pages of testimony, over 6,000 pages at trial, and over 2,000 in a Master's Proceeding. There are perhaps 2,000 pages in depositions. The case consumed at least 10 days in Motion's Court, 6 days in Pretrial, 40 days in trial, and 22 days in Master's Proceedings. There are over 250 pleadings. There are over 30 various and sundry Briefs. There have even been two prior appeals to this Court (Nos. 19,770 and 15,248). The case involves 37 pages of docket entries. Its pleadings and its papers consume ten volumes of court files, each about three to four inches thick. The record on appeal consumes the space of about 7 or 8 file drawers. It is a case which began in 1959 and will shortly enter its 10th year. The decision is 55 printed pages.

It is, in short, a monstrous record.

It is not surprising that Mr. Sankin will suggest in this Brief that the monstrous nature of the record in this case merely reflects the very monstrosity of the fraud.

We may also suggest that the case has its own theme.

That theme is found in the Opinion below:

"The conduct of Garfield and Benn-5410... makes apposite here the long since spoken words of Justice Story: 'Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse'..." Sankin v. 5410, 281 F.Supp. 524, 568 (1968)

The trial Court detailed the material parts of this "gross and wanton outrage" in some 15 printed pages (281 F.Supp. 524, 528-542).

No purpose is served in repeating here what is so thoroughly stated there. Particularly so, because the appellants, Benn-5410-Pardo have filed what they term as a brief limited to "narrow but controlling points" (p. 2); thus they do not contend, as a special issue of error, that any material finding of fraud is without substantial support in the evidence.

Their sole evidentiary attack, if there be one, is against the "one-sided evidence" allegedly relied upon in the Opinion as it relates to one matter --- the worth of International Timber Company (Appellants' Brief, p. 7) We consider that fact in the argument.

The point here, however, is that with the exception noted, the Benn-5410-Pardo Brief itself accepts the Findings to be

supported by the evidence in order to reach the allegedly narrow points of the appeal. Indeed in its own Statement of the Case, Appellants' Brief refers solely to the Opinion as the source of its "facts."

A sustained attack upon the Findings of the trial Court clearly could not be effectively made, in any event. But its almost total absence here should prevent the need for a probing search of this record, at this time, on this appeal.

What follows, therefore, in Mr. Sankin's Statement of the Case is not a total substitute for the sources of the Opinion.

It is, however, a fairly full, though still summary statement, with selective references, which this appellee trusts will focus on those facts material to the appeal.

In spite of the appellee Sankin's intent to avoid a reference to all of the findings of the Trial Court, certain detailed inclusion of significant supporting evidence appears advantageous for a full understanding of this unique case.. That necessity has regretfully lengthened this Brief. In this instance, the necessity for such facts is in the nature of the fraud itself.**

** This Court's Orders have permitted a filing of the Appendix and final printed Brief under Rule 30(c). The Joint Appendix having already been filed after the initial brief, this final printed Brief includes references to that Joint Appendix. Wherever matters were omitted from the Joint Appendix we have simply noted the transcript references (as "Tr."). Since the Joint Appendix is in two volumes, the Joint Appendix references are noted as "1 J.A." or "11 J.A." as appropriate. Appellants Benn, Pardo and 5410 designated pages 1-140C in the Joint Appendix and the balance were incorporated by the appellees Garfield and Sankin. In general the first volume of the Joint Appendix includes pleadings, opinion, motions and exhibits; the second volume, which begins at J.A. 268, incorporates testimony and undisputed facts.

3. Counterstatement of Facts

Julius Sankin and Joseph Garfield were related to Herman Mankes, father-in-law of Mr. Sankin and uncle of Mr. Garfield. They formed a partnership in an apartment building venture which ultimately became known as the Garfield Apartments. Its address is 5410 Connecticut Avenue, Northwest, Washington, D. C.

This partnership agreement was entered into and evidenced by a document denominated as a Memorandum of Agreement dated April 19, 1956, (Ptf's. Ex. 1). The land involved, upon which the apartment house was built, was acquired by both parties in their individual names in April of 1956; both were jointly responsible on its mortgage. (Tr. 221, Vol. 2).

The partnership relationship became reflected in two close corporations formed by the parties, and in which they became the sole stockholders (Pltf's. Ex. 16, 17, Minute books). One was called Garfield and Sankin, Inc., which was to be the owning corporation, and the other was known as Julius Sankin, Inc., which was to be the corporation to build the project. Both Joseph Garfield and Julius Sankin, as individuals, held the sole stock in these corporations; Mr. Garfield was to supply the substantial cash capital for financing and construction, and Mr. Sankin the

planning, building and effort. Mr. Garfield would remain at his business in Miami and Mr. Sankin, as builder, would do those things necessary to convert the capital into a profitable project.

The partnership interests and assets were all transferred to the corporations; Mr. Sankin received a one-third shareholding interest from each of the two corporations; Mr. Garfield received a two-thirds shareholding interest in both corporations (Tr. 222-224, Vol. 2; see also Undisputed Facts, Tr. 1806; II J.A. 268-271).

On May 1, 1958, Sankin and Garfield entered into the same shareholder's agreement in both corporations. They are Plaintiff's Exhibits 2 and 3 admitted into evidence (Tr. 230, Vol. 2; I J.A. 170A). We set them forth here for ready reference:

****STOCKHOLDERS AGREEMENT****

This agreement entered into this 1st day of May, 1958 by and between the undersigned, stockholders of Garfield and Sankin, Inc., (and Julius Sankin, Inc.) a corporation created and existing under the laws of the District of Columbia.

1. Notwithstanding the amount and percentage of the whole of the common stock of Garfield and Sankin, Inc., (and Julius Sankin, Inc.) owned by each of the undersigned, they and each of them, severally and individually, for themselves, their heirs, and assigns, agree that each shall have an equal vote in the affairs of the corporation(s). The effect of this agreement is that neither one of the undersigned, heirs, or assigns, can have a larger or greater vote than the other irrespective of the numerical amount of the stock owned by each of the undersigned.

2. In case of any disagreement the matter is to be resolved by arbitration, each side of the controversy appointing one member and the two so appointed, in case of disagreement, to select a third.

3. It is further agreed by the undersigned that each stockholder and his heirs and assigns will not dispose of any of the shares without first offering same upon 30 days written notice to

the other stockholder or stockholders.

4. Nothing herein contained shall affect the proportion of profit or loss which is based on the percentage of stock owned by each of the undersigned.

Witness:

/s/ A. M. Chaite

/s/ J. A. Garfield

/s/ A. M. Chaite

/s/ Julius Sankin "

In substance, then, the agreement in each corporation bound each of the parties to vote equally in the corporation, and it bound each to give the other the thirty day first right to purchase the stock of the other, in the event of a desire to sell or to transfer such stock. The interpretation of these documents, of course, is a legal question based upon the testimony and evidence. The plaintiff testified --- and his testimony was not disputed, nor was there any conflicting evidence --- that it was an understanding of the parties at the time of the execution of this agreement that each of them (Joseph Garfield and Julius Sankin) would have the right to purchase the other's interest in the event of a potential sale for a period of thirty days before and prior to the consummation of such sale, and further, that the terms of sale would be that each would have the right to purchase at the sum equal to a bona fide offer or at a reasonable price (Tr. 608, Vol. 4; Tr. 622-624, Vol. 5, Tr. 681, Vol. 5; II J.A. 272-274, 281-282).

The reason and intent of the restriction in the agreements was testified to by Mr. Sankin on cross examination by Mr. Beck, attorney for the alleged shareholders of 5410:

"At the time this May 1, 1958 agreement was entered into, there were discussions with Mr. Garfield and myself. We stated very clearly to each other that this was essentially a partnership arrangement; this right of purchase was a personal one so that neither of us could be foisted with an unwanted partner or associate; that in order to avoid this possibility the other partner would always have a right to purchase first the other person's shares of stock at a reasonable or bona fide price." (Tr. 622-623, II J.A. 273-274).

Mr. Sankin's testimony merely reflects his basic legal position that, both in fact and in legal interpretation, the agreements of May 1, 1958 were intended to, and did in fact provide for a first right, in each of the shareholders, for a period of thirty days, to purchase the shares of the other; that by parol or oral agreement the terms of sale were to be at a price equal to a bona fide purchase price offered by a third person, or at a reasonable, market value price, and further that the agreements were intended to and did in fact provide that each shareholder would exercise no greater control or vote than the other. (Tr. 1806, et. seq., Undisputed Facts Vol. 14; Tr. 608, Vol. 4; Tr. 622-624, Vol. 4; Tr. 681, Vol. 4; II J.A. 268-274, 281-282).

As noted in the mass of testimony that was given in this case, and in the proliferation of endless exhibits produced, Mr. Sankin's statements, relating to the terms of the purchase and the understanding

and intent of the parties as to the right of first purchase itself, were given without contradiction or challenge.

These, then, are the shareholder agreements and understandings which are at issue in this case.

It is conceded that, at Mr. Garfield's request, the share certificates of Garfield and Sankin, Inc., and Julius Sankin, Inc., were actually devoid of any mention of the restrictions in those agreements.

There was evidence, perhaps not material to the "narrow" appeal here, that those agreements were in fact affixed to the minute books (Tr. 235, Vol. 2).

But it is not disputed at bar, that, since Mr. Garfield did not desire his wife, Janet Garfield, to know about the restrictions --- especially the voting restriction, he insisted that they not appear upon the share certificates; and to this demand, it is conceded, Mr. Sankin did not demur. (Tr. 4079, Vol. 28; II J.A. 285-286, 282).

Such was the situation between the two men on May 1, 1958.

Thereafter the building began. But by February of 1959, Mr. Garfield had become "unhappy" with Mr. Sankin; he no longer felt he had control and he felt that he was not sufficiently consulted by Mr. Sankin. (Tr. 4080, Vol. 28; 758, Vol. 5; I J.A. 152; II J.A. 286, 339). It was then, during the course of a plane trip in February of 1959, that Mr. Garfield told his wife for the first time about the voting arrangements. (Tr. 759, Vol. 5; Garf. Ans para. 2, p. 5; I J.A. 152, II J.A. 340). As a consequence Mrs. Garfield urged her husband to try to do something about the situation; and further she said the person who could best correct it for him was one James Benn (Garfield

Answer, para. 3, p. 5; Tr. 758-759, Vol. 5; Tr. 4074-4077; I J.A. 153-154; II J.A. 339-340, 284-285).

James Benn was not a stranger to the Garfields. Mrs. Garfield later admitted that she had had an affair for a period of some three years with James Benn, which was continuing at the very time of these discussions with her husband; she even later admitted that Benn and she intended to be married after Benn settled his income tax case in July of 1959; but of course, Mr. Garfield was then, at least as of February 1959, totally unaware of the affair. (Tr. 759-763, Vol. 5; II J.A. 340-345).

Mrs. Garfield and Benn, whose relationship developed during a previous business dispute between Mr. Benn and Mr. Garfield, discussed Benn's becoming "interested" in the Garfield apartment project well before the February 1959 plane trip (Tr. 761, Vol. 5; II J.A. 341). During the course of their affair and discussions of a proposed marriage between them, Mr. Benn indicated that he had looked at the apartment house area and thought it was a "nice project"; he importuned Mrs. Garfield to try to find some method by which he (Benn) could become "involved with Joe" in the apartment building project and indeed, in "anything else (her) husband was doing" (Tr. 759-762, Vol. 5; II J.A. 340-342).

That February plane trip gave Mrs. Garfield her opportunity. Although they had had previous disputes, she prevailed upon her husband to speak with Benn. In spite of the fact that he was not a lawyer, as Mrs. Garfield noted, Benn professed to "know the law" and "know all the legal technicalities" because of his diverse business interests all over the world. (Tr. 765, Vol. 5; Tr. 885-B, Vol. 6; Garfield Answer, p. 5; I J.A. 153-154; II J.A. 343-344, 360).

And so it was that Garfield and Benn met again shortly thereafter.

What developed from this meeting was an overall scheme between these conspirators to deprive Sankin of his rights (Garfield ... Answer, p. 5-18, Tr. 5111-5131, Vol. 36; Tr. 765-882, Vol. 5; I J.S. 153-164; II J.A. 287-303; 344-356).

The details of the scheme and fraud shifted to fit necessity.

It was a conspiracy to defraud in which, not only the parties themselves (The Garfields, Benn and the corporation to be formed, which was later known as 5410 Connecticut Avenue Corporation), but the law itself, became a party to the conspiracy. This type of conspiracy was to be one in which James Benn, aided by "5410" and the Garfields, set out to employ legal principles relating to bona fide purchasers for value --- rulings of law and the Statutes of the District of Columbia --- as the very instrument of the fraudulent conspiracy. (Tr. 235-236, Sankin; Tr. 1442-1444, Dobin; Tr. 4681, Sankin; II J.A. 274-275, 283, 426-427).

The unfolding of the terms of the conspiracy began with a meeting at the office of Mr. Benn's attorney, appellant Joseph Pardo, on March 14, 1959, with the parties alone, and no attorney present.

As the Garfields described the scheme, its specifics were largely left to the mental agility of Mr. Benn.

Benn said he did the "necessary" things to encourage the Garfields, to aid in the scheme; he claimed to have investigated Sankin and

disparaged his reputation; he assured Garfield that he (Benn) desired no money for his efforts but instead insisted that by aiding Garfield, Benn would then be able to feel he had "made up" to him for their previous business dispute; all the while, Benn's affair with Mrs. Garfield persisted until their confederation was exposed and Mr. Garfield obtained counsel (Tr. 786-787, Vol. 5; Tr. 915, Vol. 6; Garf. Ans., p. 5-18, Opinion Below, 281 F.Supp. 524, 529-542; I J.A. 34-47, 153-165; II J.A. 353).

Part of the scheme was the creation of a corporation, whose secret control would be held by Joseph Garfield, but would be ostensibly or apparently controlled by James Benn. This corporation is defendant, 5410 Connecticut Avenue Corporation (referred to as "5410"); an impressive number of technically-phrased legal documents were to be, and were in fact, prepared by the knowledgeable Mr. Benn to give the appearance of a bona fide transaction; these documents, admitted into evidence consist of certain purported stock purchase agreements dated April 8th and April 21st, 1959, escrow agreements, stock powers, letters, notes, receipts, "5410" corporate Minutes, and various other documents (Plaintiff's Exhibits 22, 23, 24, 25, 26, 27, 47; I J.A. 171-200).

In one respect, because it becomes a material, or at least subsidiary issue on the Benn Motion for a New Trial, it might be observed that these so-called "agreements" included specific reference to and recognition of Mr. Sankin's rights. For example, paragraph 9 of the March 14, 1959 "Stock Purchase Agreement" between Mr. Garfield and Mr. Benn provides this:

"9. Heretofore the SELLER agreed to give and did give and grant to JULIUS SANKIN, 5400 Uppingham Street, Chevy Chase, Maryland, a thirty (30) day option to purchase the said 66-2/3 shares of common-voting stock of Garfield & Sankin, Inc., sold hereunder. Therefore, the PURCHASER agrees with the SELLER that the PURCHASER is purchasing said 66-2/3 shares of common-voting stock subject to JULIUS SANKIN's option to purchase said 66-2/3 shares of stock upon the same terms and conditions as the PURCHASER named herein."

Of course, all of these "agreements" were no more than a fictitious fraud. (Garfield's Answer and Cross-Claim; Tr. 5192-5244, Vol. 37; 1 J.A. 148-170; 11 J.A. 303-308).

Mr. Garfield summarized it, the entire effect of each document, with these words about all of the Benn-5410-Garfield papers: "None of them were true None of the documents expressed any of the truth of the matter." (Tr. 5213, Vol. 37; 11 J.A. 319).

The scheme in essence was to set a price so extremely exorbitant that Mr. Sankin would not be able to meet it and, therefore, could not, or would not exercise his right of first refusal; in turn, the purchasing corporation (5410) was to appear to be a bona fide purchaser, and as such, apparently able to eliminate Sankin's rights under the May 1, 1958 agreements, precisely because, as Mr. Benn claimed, the law requires the restrictions to be on the face of the certificate. As part of that scheme, Mr. Garfield was to relinquish all appearances or contact with the matter and everything was to be left in the hands and in the control of James T. Benn; every effort was to be made to paint the transaction as an arms length, good faith transfer, and all documents which were signed

by and between the parties were an effectuation of that scheme; as stated, the law itself became the prime instrumentality of the fraud. It was a purported or claimed legal rule --- that a bona fide purchaser for value is not bound by restrictions on stock certificates which do not appear on the face of the certificate --- which was employed by Benn and his abettors to perpetrate the fraud; Benn was the catalyst, aided by the Garfields and 5410; the law itself was the tool. (Tr. 235, Vol. 2; 767-768, Vol. 5; 1442-1444, Vol. II; 5192-5244, Vol. 37; Garf. Ex. 100; II J.A. 274-275, 426-427, 303-338).

As a consequence, the documents were signed and preparations made to advise Mr. Sankin of Mr. Garfield's alleged attempt to sell his interests in Garfield and Sankin, Inc. and Julius Sankin, Inc. to 5410 Connecticut Avenue Corporation, as reflected by the April 8 and April 21 documents (Plaintiff's Exhibits 22 and 25, Stock purchase Agreements; I J.A. 171-180).

The first notice of the supposed "sale" was given to Mr. Sankin at an unscheduled confrontation that disintegrated into rancor on April 21, 1959. Present at this meeting, among others, were Mr. and Mrs. Garfield, Mr. Benn, and Mr. Sankin.

We set forth, in the Appendix to this Brief, the descriptions of that meeting, alluded to in the Garfield Answer and Cross-Claim and testimony, as testified to by Mr. Sankin and by Mrs. Garfield. We do so, so that this Court may more readily refer to the nature of the man, James Benn, and the nature of his scheme. (Sankin Brief Appendix, pp. D-G).

The basic conspiracy continued with more documents.

The price set in the original agreements for the purchase of the Garfield interest was \$800,000.00 (Plaintiff's Exhibits 22 and 25). Notes were prepared by 5410 Connecticut Avenue Corporation totalling that "price" (Plaintiff's Exhibit, 51,52). Except for its sham claim to Garfield's interests, quite obviously 5410 Connecticut Avenue Corporation had no other significant "assets" whatsoever; at the time of the agreements its total assets consisted of \$1,000.00 in the bank, given to Mr. Benn by Mr. Garfield.^{1/} This newly formed corporation with a \$1,000.00 deposit in the bank could not have paid \$8,000.00 for Garfield's shares, no less than fulfilling notes of one hundred times that figure. So it was that Mr. Benn prevailed upon the Garfields to arrange for the apparant "payment" of these 5410 corporate notes of \$800,000.00. This would transform "5410" into something other than an apparent shell. It was one more step to inject the ingredient of good faith. Thus, an ostensible transfer of 2,000 shares in a Panamanian corporation held by Benn, called International Timber Corporation, was made in "exchange" for the \$800,000.00 in "5410" notes (Pltf's.Ex. 41,42). Although they did not receive the actual stock in this Panamanian corporation, a receipt was signed by the Garfields on May 4, 1959, evidencing this pretended transfer or

^{1/} Mr. Benn testified that he would have given the corporation the \$120,000.00 in \$100 bills that was later found in his brief case. When asked where he obtained the money he explained he received \$30,000.00 from one Mozelle Jones but could not explain the rest. He said that he kept the money, all in packets of \$100 bills, in the air conditioning unit at the office of his attorney, Benjamin Saunders!! (Tr. 4562-4568, Vol. 31; II J.A. 368-373).

exchange. Letters and documents were signed and sent to Riggs Bank for Riggs to exercise an "escrow" authority over the stock. Additional documents would "advise" Riggs of the cancellation of the notes. These "documents", along with an "Irrevocable Assignment" of all alleged moneys "owed" Garfield, were prepared on May 4, 1959 by Mr. Benn for one reason --- because, as Mrs. Garfield noted, "Mr. Benn repeated that Mr. Garfield had to show more consideration for '5410'"; that it "hadn't looked real"; and that they (the Garfields) had to do all of those things and continue to sign all of those documents as would make the transaction "appear bona fide" (Plaintiff's Exhibit 33, 35, 36; Garf. Cross Claim; Tr. 5192-5244, Vol. 37; 798, Vol. 5; 866-897, Vol. 6; I J.A. 152-165; II J.A. 303-338, 354).

The evidence in the case shows that International Timber Corporation was itself an entity of little or no value.

Not only Mr. and Mrs. Garfield, but the testimony of Mr. Link, an intervenor-defendant and alleged purchaser of a part of Mr. Benn's shares in 5410, showed the minimal value of the alleged "assets" of International Timber; (Tr. 2821-2828, 2927-2930, Vol. 20; II J.A. 388-391).

Not only did Mr. Link do so, but Mr. Dinty Whiting, attorney for Mr. Benn and a "purchaser" from him, in a deposition admitted into evidence, similarly testified to the shell-like qualities of International Timber (Tr. 2973-2975, Vol. 21; II J.A. 392-399). Mr. Whiting, it will be recalled, is the lawyer who was unable to attend the court proceedings because he was incarcerated as a result of a conviction in a multi-million

dollar fraud; it was he who was paid \$18,000.00 in \$100.00 bills by Mr. Benn for the express purpose of purchasing 5410 shares; it was he who one week later allegedly gave Mr. Benn \$20,000.00 in \$100.00 bills for the 5410 shares (Opinion, 281 F.Supp. 524, 540; I J.A. 45).

Even Mr. Benn himself, in effect, conceded the fact that International Timber had no significant value when he admitted to the Court that he "paid" \$15,000.00 for Surinam-American Timber Co. and that International had no more than a one-half interest in Surinam American. (Tr. 5313-5322, Vol. 38; Opinion 281 F. Supp. at 537-540; Tr. 4929-4938, Vol. 34; I J.A. 42-45; II J.A. 362-368).

Mr. Garfield denied ever receiving any International Timber shares; he insisted that to carry out the scheme he received no more than stock powers for which the \$800,000.00 "debt" in 5410 notes was cancelled. These were stock powers, then, in a corporation of little or no value, and were the means by which 5410 "paid" Mr. Garfield on May 5, 1959.

Mr. Sankin's testimony reflects the use to which these cancelled notes of 5410 were put; he responded to Mr. Benn's own questions as follows (Tr. 4681, Vol. 32; II J.A. 283):

Q. (Mr. Benn): Addressing ourselves to the date of May 15, 1959, please sir, Do you recall how many of the May 4, 1959 documents that I showed you at that time?

A. (Mr. Sankin): No.

Q. Did you see the cancelled notes?

A. My recollection, Mr. Benn, is that you exhibited to me a photostat of the cancelled notes

and told me that this is a completed transaction under the D. C. Corporation Code and Negotiable Instruments Law; that while I might have had a chance on an executory contract, on an executed contract, I'm through and I had better not play rough with you."

This was how Mr. Benn used International Timber.

In the meantime, however, the Garfields were not always compliant in their abetting of the Benn-5410-Garfield fraud. Efforts were made by Mr. Garfield to pay Mr. Benn for his time and to refuse to sign any further papers, but Mr. Benn was persuasive and convinced the Garfields that they had "nothing to worry about," that Sankin had been taking "advantage" of them; and that "5410" was their corporation. (Garf. Ans.-Cr. Claim; Tr. 863-871, 873, Vol. 6; I J.A. 148-170).

Mr. Garfield, therefore, continued to join in Benn's bidding.

He did so at least until May 11, 1959. But the web became more tangled and it caught the Garfields as well in a series of unexpected, kaleidoscopic events: successive 5410 stock certificates transfers by Benn to them, all with differing restrictions; an episode involving \$120,000.00 in cash seized by Mrs. Garfield when she snatched Mr. Benn's briefcase in order to obtain Mr. Garfield's papers; Mr. Garfield's disenchantment with Benn; Garfield's awareness of the relationship between Mr. Benn and Mrs. Garfield, and finally, the realization by Garfield that he had become financially contaminated by the fallout from the scheme and chicane. (Garf. Ans.-Cr. Claim, Tr. 5192-5245, 901-907, 911-930; 943-957, Vol. 6; I J.A. 164; II J.A. 303-338).

And so, for the first time, on May 11, 1959, he consulted with counsel (Tr. 1992, Vol. 15). That counsel was Mr. Don G. Nicholson, a witness in this case (Tr. 1859, Vol. 14; II J.A. 412-424). Mr. Nicholson communicated with, and arranged for Mr. Garfield to be represented in Washington by one Mr. Arthur Phelan of the firm of Hogan and Hartson (Tr. 1812-1813, Vol. 14; II J.A. 400-411).

Certain facts which developed from this point were testified to by Mr. Phelan: Acting on Garfield's behalf, he addressed a letter to Mr. Saunders, local attorney for 5410 Connecticut Avenue Corporation on May 14, 1959 (Pltfs. Ex. 48); he informed him of Garfield's claim of "over-reaching." (Tr. 1813-1815, Vol. 14; II J.A. 402-403). Attached to the letter of May 14, which Mr. Phelan hand delivered, were photostatic copies of share certificates made out to Mr. Garfield reflecting that Garfield held 100 shares in 5410, the number of shares understood to be all the outstanding stock in that corporation (Pltfs. Ex. 28,30; Tr. 1815-1819, Vol. 14; II J.A. 403-408). In substance, Mr. Phelan put Mr. Saunders and 5410 on plain notice of the Garfield claim to total ownership of 5410. Mr. Phelan was soon advised that Mr. Benn had just amended the charter and increased the authorized stock of "5410" from 100 to 250 shares; Mr. Phelan then addressed a further letter, enclosing the stock power in International Timber Corporation (Pltf's.Ex. 31,49); finding difficulty in obtaining information from Mr. Saunders, and in establishing the Garfield position and feeling he was being misled, Mr. Phelan was unable to conclude any agreement or rescission of the transaction (Tr. 1820-1825, Vol. 14, Phelan; Tr. 2042-3, 2047-2065, Vol. 15, Nicholson; II J.A. 408-411, 424).

At approximately the same time as Mr. Phelan's first contacts with Mr. Saunders, Mr. Sankin, on May 15, 1959, addressed a letter to Mr. Garfield seeking to purchase a portion of Mr. Garfield's shares, specifically 16 2/3 shares (Plaintiff's Ex. 18). This offer was rejected by Mr. Garfield's letter of May 21 (Plaintiff's Exhibit 19).

By this time, Mr. Sankin, had consulted and employed counsel --- Mr. Paul Dobin and Mr. Benjamin B. Brown, members of this bar. (Tr. 1439-1440, Vol. 11).

While he had received copies of certain of the Benn-5410-Garfield documents, Mr. Sankin had earlier noted that some were illegible reproductions. Though still not acknowledging 5410's "rights", Mr. Sankin finally did receive a letter of May 8 from Mr. Saunders, in effect asserting that 5410 would not object to an exercise of Mr. Sankin's right to purchase, until May 30, 1959; a similar letter dated May 19th was sent by Mr. Nicholson on behalf of Mr. Garfield. (Pltf's. Ex. 100, Def.-Intervenor's Ex. 2, 3, 9, Tr. 604-606, Vol. 4).

Sankin knew, therefore, he must act before May 30th. Garfield was guarded to say the least. Benn was active.

On May 15th, the ubiquitous Mr. Benn, accompanied by Mr. Dinty Witing, who was introduced as Mr. Benn's attorney, met with Mr. Sankin and his counsel, Mr. Dobin, at the apartment house. It was during this meeting that Mr. Benn asserted he paid much more than Garfield's shares were worth, but that he would buy Mr. Sankin's interests for \$250,000.00, provided the sale were effected outside the United States (Tr. 258-261, Tr. 634, 637; II J.A. 278-281). Mr. Sankin accepted the offer promptly

and the terms were to be arranged between respective counsel. A revealing description was offered of that meeting, testified to by Mr. Dobin. It, too, is set forth in the Appendix to this Brief because it succinctly summarizes much of what is expressed and implied in the findings of the Court. (Tr. 1442-1444, Vol. 11; App. H-I).

Unknown to Mr. Sankin, it appears that Mr. Nicholson was attempting to carry forward rescission efforts that had been initiated by Mr. Phelan. Mr. Nicholson prepared a rescission agreement, the apparent intent of which was to unravel the transaction between Mr. Garfield, Mr. Benn and 5410, giving clear title to 5410 shares to Mr. Garfield and paying Mr. Benn for "time and trouble"; thereafter, presumably to return matters to the status quo before Mr. Benn. That document, which is Plaintiff's Exhibit 15, was never signed by any of the parties. It became, and indeed is, a significant document in this case, but it did not come to Mr. Sankin's attention until some time later. While dealing with Benn and Whiting for a rescission, Mr. Nicholson was in communication with Mr. Dobin to resolve their disputes.

On May 23, 1959, Sankin was told by Whiting that since he (Whiting) could not reach Benn, the documents to reflect the attempted purchase by Benn would not be prepared (Tr. 278, Vol. 2; Tr. 1455-1456, Vol. 11, Dobin; 11 J.A. 281).

Mr. Nicholson's contacts with Mr. Dobin finally resulted in Mr. Nicholson's bringing to Washington certain agreements which would effectuate a sale; they would provide for limited personal liability to Mr. Sankin, much the same as received by Benn through the use of the

corporate form. They would give Mr. Sankin what Mr. Benn received, although at the \$800,000.00 price, subject to the return to the prior positions in the event of default.

On May 26, 1959, Mr. Nicholson had available all the documents previously discussed between them; a meeting was held, lasting almost the entire day; various corrections were made; and finally all papers were signed by Mr. Sankin and Mr. Garfield (Tr. 2078-2085, Vol. 15, Nicholson; Tr. 1470-1471, Vol. 11). Among these documents, which are in evidence, can be found an agreement of shareholders, a pledge agreement, promissory notes, totaling \$800,000.00, a voting trust agreement, releases, and other documents which appear as Plaintiff's Exhibits 4 through 13 (Tr. 1470-1471, 1524-1532, Vol. 11, Dobin).

No disclosure had been made to Mr. Sankin of the fraud, up to the time of the execution of the May 26th agreements, and thereafter, until May 28th (Tr. 1478-1479, Vol. 11, Dobin; Tr. 363-364, Vol. 3, Sankin; Tr. 2044, 2072, Vol. 15, Nicholson; 11 J.A. 428-429, 424-425).

Upon the consummation of this transaction, and in the late afternoon of May 26, the parties went to Riggs Bank; they delivered letters advising Riggs Bank of Mr. Sankin's exercise of his rights (Pltf's. Ex. 14 and 14A); they requested Mr. Weigering of that bank to deliver Mr. Garfield's stock certificates, which had been held in escrow by the bank, to Mr. Sankin (Tr. 302, Vol. 2; 1472-1474, vol. 11). No notes were given to Mr. Wiegering because Mr. Sankin

had already delivered them to Mr. Garfield. It appears that by this time the bank vault, in which the Garfield stock certificates had been placed, was closed; therefore, Wiegering informed Mr. Garfield and Mr. Sankin and their representatives that they should return the following morning (Tr. 304-305, Vol. 2; Tr. 1472-1475, Vol. 11, Dobin).

This is the reason the Garfield shares never reached either Mr. Sankin or Mr. Benn, and why they were deposited in the Registry of the Court after suit.

The execution of these documents and the events at the Bank were not the only activities which were being carried out on May 26, 1959. Unknown to Mr. Sankin, five additional parties suddenly arrived on the scene. By a document signed in part on May 26, and in part on May 27, James Benn purportedly transferred all of his interest in "5410" to these five individuals for a purported sum of \$550,000.00. (Pltf's. Ex. 52, 45; I J.A. 197-200)

Those parties are Dinty Warmington Whiting, who has been previously identified; one Joseph Pardo, an attorney in Miami, Florida, at whose office the first meeting between the Garfields and Benn took place, and who was an officer of International Timber; Harry L. Link, Jr., the stock broker from Miami, Florida, who was also involved in International Timber; Samuel Betooff, in business as a jewelry dealer from Miami, Florida; and Stanley Winn, an alleged financial consultant:

The purported document provided that each of the five would pay Benn \$110,000.00 with various down payments to be made (Link was

to pay \$30,000.00, Whiting \$20,000.00 and the others in varying amounts. See: Pltf's. Ex. 45; I J.A. 197-200).

The evidence shows that certain notes were purportedly signed by these parties; and it is alleged that various monies were transferred to Mr. Benn on account of this agreement. It also shows conclusively that, if at all, none of the parties actually transferred any of his own funds until after May 29, 1959, the date suit was filed and 5410 served with process, (Pltf's. Ex. 53, Link check; Plts's. Ex. 108, Betoff check; Tr. 2962-2972, Vol. 21, Whiting transfer of cash; Pltf's. Ex. 70, Pardo check; Int. Ex. 64G re Winn transfer of bonds; II J.A. 392-399, Whiting).

The detailed evidence to support the contention of the Plaintiff that these transfers were all fraudulent, and were given to color the transaction further with an apparent validity, would seem to be unnecessary here.

In substance, the evidence shows that Pardo, Whiting, Link, Betoff and Winn, all had dealt with, and been familiar with International Timber Corporation before this transaction, and had knowledge of the fact that this corporation was without any assets of substance; that they made little or no investigation; that they were aware of the shareholder's agreements of May 1, 1958; that they were aware of the pattern of palpable fraud which was the special mark of the man with whom they dealt; they were on notice of the substantial discrepancy between the purchase price allegedly given by Benn, (\$800,000.00) and the purported price which they were to pay (\$550,000.00), a difference of \$250,000.00, in a transaction

involving a mere few days; they had notice either directly, or by other events of the fact that 5410 was a sham corporation; they or some of them knew that Mr. Garfield was then having difficulties with Mr. Benn and that at the very least Mr. Garfield was claiming fraud. They never even contacted Mr. Sankin or his attorney. They never looked at one recent record of the Garfield-Sankin Corporations to determine its liabilities. Nor is this all. They had their first meeting, in reference to the proposed transfer, on the morning of May 26 at the Army and Navy Club in Washington, D.C., commencing about 10:00 A.M. By either 12:00 noon, or not later than 1:00 in the afternoon, the entire agreement had been consummated orally, and all their investigation of the documents, and reading of the documents completed. Even in this Statement of the Case, it is not inappropriate to note that it is a serious question as to whether any individual could have physically read, and reasonably digested, the voluminous documents, letters, stock book, minute book, and assorted materials which were involved in this transaction, within the period of time stated. This physical improbability is a fact wholly apart from the other evidence noted which afforded knowledge to these five individuals of the fraud and suggests and shows their own participation. (Tr. 1591-1603, Vol. 12; 1750-1779, Vol. 13; 1858-1895, Vol. 14; 2308-2341, 2346-2404, Vol. 17; 2620-2652, 2668-2754, Vol. 19.)

On behalf of 5410, they sent a telegram and letter to Riggs Bank on the evening of May 26, 1959, demanding that Riggs not transfer the stock to Mr. Sankin until he paid 5410 Connecticut Avenue Corporation

\$800,000.00, thereby netting these individuals not less than \$250,000.00 in a period of but one day, without the transfer of one dollar by any of them. (Pltf. Ex. 54, 55). This was done, even though these "five" had an indemnity agreement with Mr. Benn to protect any loss they might sustain, an "agreement" they were directed to destroy (281 F. Supp. at 537; I J.A. 42).

In relating these facts, which would suggest the flavor of this fraud, it might just be noted, in passing, that while these "five intervenors" were allegedly to pay \$550,000.00 to Mr. Benn, of that sum, \$440,000.00 was to be in the form of notes and \$110,000.00 in cash; it turned out that those notes were later negotiated by Mr. Benn to a third party with whom he had previous dealings, and who had been represented by Mr. Pardo, one Mozelle Jones; she is alleged to have paid \$15,000.00 cash and given \$250,000.00 in notes to Mr. Benn for the \$440,000.00 in "intervenor" notes; and her notes were in turn still later negotiated to Nationwide Properties; and Nationwide Properties turned out to be owned by none other than James T. Benn! At trial, the notes were somewhere, with someone, whose name, place or origin could never really be established. (Tr. 5011-5018; II J.A. 374-381). The "transfers" of their notes would have presumably made Mr. Benn's friends, Messrs. Pardo, Whiting, Link, Winn and Betoﬀ outraged, or at least chagrined when they found themselves at first "sued" on the notes by Mr. Benn's old helpmate and Mr. Pardo's client, Mrs. Mozelle Jones; but obviously they felt no real concern, and that lack of concern was justified when

Mrs. Jones thereafter obligingly "dismissed" the actions. (Tr. 2734-2748, Vol. 19; 2539-2545, Vol. 18, Pardo; Tr. 1658-1670, 1679-1694, Vol. 12 and 1751-1763, Vol. 13, Betoff).

Mr. Benn has friends, indeed.

In any event, Riggs finding various claims made to the stock, delivered a letter to all parties, dated May 27, stating that under the circumstances, it would have to interplead, and it refused to turn the stock over to any party (Pltf.Ex. 108; Tr. 3027, Vol. 21, Wiegering).

Mr. Garfield returned to Washington the next day, on May 28, 1959. In view of the fact that Mr. Phelan, who had been representing Mr. Garfield up until the latter part of May, was also the attorney for Riggs Bank, he was now compelled to withdraw as Mr. Garfield's counsel because of the disputes. Mr. Richard Marshall, of the firm of Hill and Marshall, was retained to represent Mr. Garfield's interests.

On May 28, 1959, during the course of discussions at Mr. Marshall's office, the rescission agreement was noted and obtained by Mr. Sankin, who, while the attorneys were discussing the difficulties in the case, for the first time read from this agreement that it was Mr. Garfield who was to be the owner of 5410, and not Mr. Benn (Tr. 354-367, Vol. 3; Tr. 1477-1479, Dobin; 11 J.A. 428-9). It was this document which told clearly that the transaction with Mr. Benn was a sham and a fraud. Angered, he questioned Mr. Garfield about it, after pointing it out to his attorneys. Realizing that he had no choice and agreeing that its recitations were true, Mr. Garfield finally admitted and confessed to the conspiracy in

the presence of the parties and their attorneys. (Tr. 357-365, Vol. 3; Tr. 1477-1479, Vol. 11, Dobin; II J.A. 428-429).

Armed with this confession, Mr. Sankin then instituted this action.

He sought, among other things, determination of the validity of his agreements of May 1 (Pltf's. Ex. 2, 3); a determination that 5410 Connecticut Avenue Corporation had no interest in the Garfield stock; a determination of his rights under the various agreements, including his right to purchase the stock at a reasonable and fair price and the other relief which was sought in this cause, including certain injunctive relief (Plaintiff's Complaint and Order Amending Complaint).

The trial proceedings and disposition have been previously set forth in this Brief, (supra, pp. 3-8.)

Unquestionably this Statement of the Case has been extensive. No more so, of course, than the substantial evidence itself. No more so, than compelled by the unique nature of both the man and the facts.

And no more so, than has seemed essential to suggest the flavor of a flagrant fraud that so consumed each of the parties and so trespassed upon the time and the patience of the trial Court below.

We proceed to the Argument, remarking only that a Summary of it seems superfluous. The Statutes involved may be found in the Appendix to this Brief (Appendix pp. A and B).

A R G U M E N T

I. THE VOTING AND FIRST PURCHASE RESTRICTIONS ON THE SHARES AT BAR, APPEARING IN THE ORIGINAL SHAREHOLDERS' AGREEMENTS, BETWEEN MR. SANKIN AND MR. GARFIELD, ARE NOT ONLY VALID AND ENFORCEABLE IN THEMSELVES, AND AGAINST THIRD PERSONS, BUT THEY ALSO ARE NOT IN VIOLATION OF THE UNIFORM STOCK TRANSFER ACT, AND ARE NOT SUBJECT TO ATTACK BY THESE APPELLANTS, EVEN THOUGH THOSE RESTRICTIONS DID NOT APPEAR ON THE SHARE CERTIFICATES.

A. The Stock Restrictions Appearing In This Case Were Not Required To Be Placed Upon The Share Certificates, Pursuant To Section 15 Of The Uniform Stock Transfer Act (D.C. Code Title 28, Section 2915) Because That Section Applies Only To Corporate Charters, Corporate By-Laws Or Corporate Contracts And Does Not Apply To Stock Transfer Or Voting Restrictions In Shareholder Agreements.

The appellants at bar do not challenge the reasonableness of the voting and first purchase restrictions appearing in the Shareholder Agreements of May 1, 1958. It is noted, in the section that follows, precisely why they do not make that challenge. (See Appendix to this Brief, p. J, and authorities in Opinion).

Their attack, instead, is upon one flank of the Agreements, and upon one only. (Appellants' Brief, pp. 13-17)

They argue that the stock restrictions in the Agreements of May 1, 1958 are unenforceable; unenforceable not because of unreasonableness or vagueness, but unenforceable because they violate Section 15 of the Uniform Stock Transfer Act, District of Columbia Code Title 28, Section 2915, 1961 Edition.

That Section, subsequently replaced upon enactment of the Uniform Commercial Code, but then in force at the time of the Agreements and transfers at bar, states this:

"There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate." (emphasis added) (Appendix to this Brief, pp. A-B)

It is urged by this appellee that this Section does not apply to shareholder agreements. It applies to liens in favor of a corporation; it applies to the by-laws of the corporation; it applies to charters or rights or claims or contracts of a corporation. It does not apply to private agreements between shareholders.

This is the position of Mr. Sankin.

Where, it may be asked, is its support?

Its first support is in the very case authority cited by the appellants, Benn, 5410 and Pardo.

Their Brief refers to precisely five cases in its five pages of argument upon the point. (Appellants' Brief, p. 14, footnote 6; p. 16)

Let us consider each of them.

Let us consider them in detail, because, if these five cases do not state what appellants urge; if these five cases do not apply to the kind of private shareholder agreements involved here, then appellants' argument inevitably becomes no more than a mere statement of counsel, without solid support; it become no more than mere words without case content.

The earliest decision cited in their Brief is Age Publishing Company v. Becker, 110 Colo.319, 134 P. 2d 205 (1943).

In Age Publishing, the Board of Directors of a corporation capitalized at 10,000 shares, by corporate resolution, expressly authorized the sale of 1,000 shares at \$5.00 per share, but they provided, in that corporate resolution, that the shares should not be sold to the general public, and that only persons who were at that time members in good standing of The National Annuity League could become purchasers of the shares. Mr. Becker, who was a non-member of the League, purchased his shares in Age Publishing from a member. The corporate resolu-

tion was not placed on the share certificate, but, on the demurrer, it was assumed that Mr. Becker had full knowledge of the members-only share restriction. The Court required the transfer to Mr. Becker. It found that Section 15 of The Uniform Stock Transfer Act had been violated.

The significant section of the Age Publishing case, for the point here pursued, is this:

"The Indiana case, Doss v. Yingling, 95 Ind.App. 494, 172 N.E. 801, presents the issue on an identical statutory provision, i. e., section 100, supra, and while the decision, which upholds the transfer of a stock certificate which did not contain a restriction in printing thereon in conformity with the statute, is persuasive, it is based concededly upon a different state of facts than those before us. Yingling was president of the corporation and had entered into a written agreement with the other stockholders, which agreement was a part of the consideration for the purchase of stock and provided that none of them would transfer any stock without giving the others a ten day option to purchase. The court refused to permit him to invoke the statute as an excuse for violating his agreement. Of the 500 shares of stock in the corporation, Yingling held 290."
(p. 206, emphasis added)

We underscore that Age Publishing Company considered as persuasive the Indiana authority of Doss v. Yingling, 95 Ind.App. 494, 172 N.E. 801, where a private written agreement among shareholders was involved. Section 15, Age of Publishing points out, may not be invoked by a shareholder "as an excuse for violating his agreement."

Age Publishing Company really states this: a corporate resolution restricting share transfers falls within the "otherwise" clause of Section 15. It must appear on the certificate. That section, however, does not apply to "a written agreement with the other stockholders" (p. 206). Where such a shareholder agreement exists, Section 15 is no "excuse for violating that agreement." And where that agreement restricts share transfers, the line of authority reflected by Doss v. Yingling controls; it is the Doss principle that is then "persuasive" (Age Publishing, supra at p. 206).

In short, Age Publishing does not advance the contention of the appellants; indeed, it does precisely the opposite. It renders "persuasive" the very point urged in this Brief.

The next decision in point of time, cited by appellants, is plainly the most important. It is this authority upon which the appellants' remaining three cases rely.

That case is Costello v. Farrell, 234 Minn. 453, 48 N.W.2d 557 (1951).

Because it is the proverbial cornerstone case to all others cited by appellants, let us give Costello v. Farrell the especial consideration due its reliance by these appellants.

The facts of Costello show that the original by-laws of the Pepsi Cola Bottling Company provided, in By Law 36, for

first purchase rights in the other shareholders, the effect of which was to prevent a sale of shares by existing shareholders without first offering them to the others. This by-law restriction was not noted on the share certificate. The authorized and outstanding shares consisted of 90,000 sold and ultimately transferred in four blocks of 22,500 each. The original purchasers were Mr. and Mrs. Costello and Mr. and Mrs. Farrell. Mrs. Farrell's shares were ultimately placed in a trust and she ceased to be a shareholder. When Mr. Farrell died, his executor sold the estate's shares to Mrs. Farrell over the objection of Mr. Costello, the other shareholder. The Court observed that while Mrs. Farrell was not aware of the by-law restriction at the time of her agreement to purchase, she was in fact informed of it at the time of delivery of the share certificate (p. 563).

Thus the question was squarely put: Was this by-law, granting first purchase rights to existing shareholders, valid and binding upon a then-outsider, who may have ultimately had notice of it, where no such first purchase restriction appeared on the share certificate?

Costello held that this by-law was not binding upon Mr. Farrell because of the violation of Section 15 of the Uniform Stock Transfer Act.

The Court reviewed prior cases, including Age Publishing Company, supra. It observed that the only Minnesota decision was

one that pre-dated the Act, Model Clothing House v. Dickinson, 146 Minn. 367, 178 N.W. 957. More significantly in discussing Model Clothing House, the Costello Court added these points:

"...the sellers of the stock (in Model Clothing) were two of the five incorporators of the corporation, who had entered into a restrictive agreement, which, for the purpose of giving effect to the agreement, was incorporated into the by-laws. The court cancelled the sale and held that the evidence justified the finding that the sale in controversy was made in violation of such a contract to a business rival having notice of it. It is apparent, therefore, that the Model Clothing House case can have no controlling application here." (p. 562, emphasis added)

Costello, then, distinguished the Model Clothing case because it involved an agreement, a contract that was violated. It was largely on this ground that that decision was held to be applicable to the Costello facts.

Nor is this all.

Costello next discussed the two leading decisions of Baumohl v. Goldstein, 95 N.J.Eq. 597, 124 A. 118 and Doss v. Yingling, noted above. It distinguished those cases by pointing out that in each a "contract" or "written restrictive agreement" was involved. (48 N.W.2d at 562). It observed that "(no) such relationship (of contract, agreement, or privity) exists between Mrs. Farrell and the plaintiff" (ibid).

It then quotes with approval a reference to Doss v. Yingling, cited in the Age Publishing case, supra. p. (44 N.W.2d at 562-563).

It follows that very approval by distinguishing the case of Henry Simons Lumber Company v. Simons, 232 Minn. 187, 44 N.W.2d 726 with these compelling contentions:

"Plaintiff also cites the recent case of Henry Simons Lbr. Co. v. Simons, 232 Minn. 187, 44 N.W.2d 726. That case involved an agreement entered into by a corporation with its shareholders, defendant being one of them, requiring the individual shareholders to offer their shares to the corporation and to other shareholders on specified terms before selling to an outsider. That brief statement of the Simons case is sufficient to indicate that the question involved in that case is not the same or similar to the one involved here. There was no contract between Mrs. Farrell and the corporation or Costello agreeing to a restriction on the sale of stock of the corporation. In our opinion, the restrictive by-law, which was not stated on certificate No. 87, the certificate which Mrs. Farrell purchased, is no restriction upon the transfer of the shares represented by the certificate." (p. 563, emphasis added)

"One of the purposes of the statute, (Section 15 of the Uniform Stock Transfer Act) must have been to avoid such litigation as we have here. This is not a case where there has been an agreement for a restriction between the selling stockholder and the other stockholders." (p. 563, emphasis added)

The latter sentence from Costello, just underscored, summarizes everything that went before it.

It summarizes precisely what Section 15 applies to and what it does not apply to.

It shows when Doss and Baumohl are "persuasive" to the Costello Court, and when they are not.

Costello's vital distinction from Doss v. Yingling and Baumohl v. Goldstein, by its own opinion, is in these words:

"This is not a case where there has been an agreement for a restriction between the selling stockholder and the other stockholders" (44 N.W.2d at 563).

Costello v. Farrell was not such a case. It is not a shareholder agreement case. It is a by-law case.

But Sankin v. 5410 Connecticut Avenue --- this very appeal --- is precisely what Costello was not.

Costello v. Farrell, as the very cornerstone of appellants agreement, crumbles when appellants employ its support.

Costello v. Farrell, like Age Publishing v. Becker, not only fails to advance appellants one whit; it turns their very argument upon themselves by plainly positing that Section 15 applies only to restrictions imposed by a corporation, in corporate by-laws, or in corporate charters, or corporate resolutions, or corporate contracts.

The next chronological case cited is Sorricks v. Consolidated Telephone Company, 340 Mich. 463, 65 N.W.2d 713 (1954). (Appellants Brief, p. 14, footnote 6).

Sorrick involved telephone company shares in a company by-law. That by-law provided that no member could own more than five shares. In spite of these provisions, of which Sorrick as custodian of the records, had notice, Sorrick obtained 25 shares and later sought another share which was the subject matter of the suit.

Michigan's Section 15 statute was similar to all others, including that in Costello, and that in the case at bar.

The Sorrick Court simply quoted from the syllabus by the Court in Costello v. Farrell, supra., and adopted its position (65 N.W.2d at 716).

It did so with these words: "We are mindful, as indicated in the authorities annotated in 29 A.L.R.2d 901 that there are divergent lines of authorities on the subject. We are impressed, however, with the reasoning of the Supreme Court of Minnesota in Costello v. Farrell, 234 Minn. 453, 48 N.W.2d 557, 29 A.L.R.2d 890...." (265 N.W.2d at 716)

Thus Sorrick without reasons or significant explanation simply implants Costello in the Michigan law.

Sorrick, we note, involved a by-law, not an agreement.

Sorrick is simply Costello, garbed in a Michigan citation.

Sorrick is support for appellants only if the cornerstone case, Costello v. Farrell, is secure.

We have already sufficiently shown the insecurity of that support for appellants' case.

Thus far, then, of appellants' authorities Age Publishing specifically supports the Sankin position. Costello confirms it, expressly and by analysis, and Sorrick adopts Costello.

The case of Hopwood v. Topsham Telephone Company, 120 Vt. 97, 132 A.2d 170 (1957) is similarly cited by appellants. (Brief, p. 14, footnote 6)

That case, not surprisingly, also involved a by-law. In this instance the by-law required that before sale, any shares must be first offered for purchase to the board of directors for the company or the directors themselves. The plaintiff was not a member of the corporation or a shareholder at the time of the by-law, but became aware of some general restriction in the by-laws. That share restriction did not appear on the certificates, and the first purchase offer to the directors was not made. The Court assumed for the purposes of the case that the plaintiff was "chargeable with knowledge of the by-laws as adopted" (p. 172)

The Hopwood Court then said this:

"The defendants...take the position that the statute is of no avail to the plaintiff despite its requirement that any restriction on transfer be stated on the certificates. This is because, they say, that the plaintiff had notice and knowledge of the restriction. This raises the question: can notice take the place of compliance with the Statute? There are authorities which say that the answer to this question is "No". Notably among these is Costello v. Farrell, 1951, 234 Minn. 453, 48 N.W.2d 557, 561, 29 A.L.R.2d 890."

"So also it has been held that where a by-law limiting stock holding to five shares was not printed on shares, purchaser acquiring more than five was entitled to have them transferred on corporation's books even though he was corporation officer and knew of restriction. Sorrick v. Consolidated Tel. Co., 340 Mich. 463, 65 N.W.2d 713. See annotation in 29 A.L.R.2d 890, *supra*, for further discussion and cases." (132 A.2d 170, 173)

The Hopwood Court then considered the impact of Doss and Baumohl, but determined that neither case was persuasive because "(in) each the transfer was sought by an officer of the corporation who not only had knowledge of the restriction but also stood in a fiduciary relationship to the other stockholders." (p. 174). These are precisely the facts on this appeal --- a transfer by an original officer holding a fiduciary relationship to his fellow stockholder. The point is developed in detail in the section that follows. Finally, Hopwood further observes that the by-law itself upon which reliance for the restriction was made, expressly and mandatorily requires that the share certificates show any transfer restrictions. By its very terms, the by-law in Hopwood defeats any claimed reliance upon it (132 A.2d at 174).

Hopwood v. Topsham Telephone Company, does no more for the appellants than did Age Publishing, Costello, or Sorrick.

It involved a by-law: it affirms the validity of Doss and Baumohl; it adopts Costello. It does not apply to a private agreement among the shareholders.

The final decision to which appellants must inevitably retreat is Straits Transit, Inc. v. Union Terminal Piers, 370 Mich. 274, 121 N.W.2d 679 (1963). (Appellants' Brief p. 16)

Although in their Brief these appellants do not show the reason, nor do they distinguish Straits Transit from Costello and Sorricks, there are facts, unanalyzed or discussed in Straits Transit, which might support the appellants' argument to an extent not to be found in any other authority. This is so because Straits Transit does involve a shareholder's agreement.

Straits Transit arose out of the dismissal of a complaint for failure to state a cause of action on two counts. The Supreme Court of Michigan reversed the lower Court on the first point urged by the plaintiff, namely that they sufficiently alleged an action under the Michigan anti-monopoly statute. It sustained dismissal on the second point, which relates to matters here.

The plaintiffs were both Straits Transit (the corporation) and some of the shareholders. The defendants were Arnold Transit and four shareholders of Straits (the Woods and the Proctors). Apparently these defendant shareholders were parties to a shareholder's agreement restricting transfer of the stock to a 90 day first purchase right in the other shareholders. There was a by-law also involved, making the same provisions. Neither the by-law nor the agreement

restriction was set forth or endorsed on the certificates. The admitted facts showed that an outsider, defendant Rudolph, on behalf of Arnold Transit, offered to buy the Wood and Proctor shares (which together equalled 6,000 of the 34,000 issued), and the shares were delivered. The Court simply sustained the decision below with this observation: "The trial judge found the restriction unenforceable, based upon the Sorrick case cited above, and also upon the case of Costello v. Farrell, 234 Minn. 453, 48 N.W.2d 557, 29 A.L.R.2d 890." (Straits Transit, supra p. 683)

There was no discussion of what Costello, and thus Sorrick, really held. There was no attempt to relate reasons for the application of Section 15, limited by Costello to the case of corporate action in corporate by-laws and corporate contracts, to private shareholder agreements. We have attempted, by analysis of the Straits Transit facts to grant appellants, Benn-5410-Pardo, even more than they appeared to see in the case. Still, it adds nothing in an affirmative way. It does not even consider Section 7, discussed infra.

This, then, is the sum total of all of the authority amassed from all of the cases appellants researched to support their position that Section 15 of The Uniform Stock Transfer Act strikes at shareholder agreements.

That support is certainly not to be found in Age Publishing Company; nor in Costello; nor in Sorrick; nor in Hopwood; nor even in the unspoken lines of Straits Transits.

Each of those cases in its own way serves to

underscore and underpin the very points of the plaintiff, Mr. Sankin.

No, none of these authorities is of any aid to appellants. And the one case which has the necessary fact, never analyzes it, but simply rests itself on a "rule" that turns out never to have been there in the first place.

In sum, the echo that returns from the sounds which appellants seek to find in the five cases cited in their Brief, does not speak for them.

Their position on Section 15 is simply not in accord with authority.

Let us now consider the countervailing cases.

What further authorities, besides those implicit in the appellants' argument, previously alluded to, sustain the assertion that Section 15 of The Uniform Stock Transfer Act does not apply to agreements between shareholders?

Certainly there are the two leading decisions of Doss v. Yingling, 95 Ind.App. 494, 172 N.E. 801 (1930) and Baumohl v. Goldstein 95 N.J.Eq. 597, 124 A. 118 (1924).

In Baumohl, the by-laws restricted transfers to a first purchase right in the corporation. The Court adopted the view, later to be found in a number of authorities, that the by-laws of a

corporation "... may be enforced as a contract between the corporation and the stockholders, and between the latter inter sese." (124 A. at 119)

As another Court observed, "(it) is of course well settled that 'a void by-law may become a valid contract'...." (emphasis added) Palmer v. Chamberlin 191 F.2d 532, 536 and in particular see those authorities cited in footnote 1 of that decision.

Not all Courts have employed that approach, by finding in a "void" by-law which is actually assented to, a valid agreement. Apparently the Costello v. Farrell line of authority rejects that approach, at least where no actual agreement on the by-law has been made by the party affected.

But for our purposes here, we need not dissect the matter that closely.

Suffice it to say, Baumohl considered its facts solely on the basis of a theory of an actual agreement between the shareholders, however made. It had before it the self-same provisions of Section 15 as are at bar. It had before it the self-same problem, for the restriction there was also absent from the share certificate.

The Baumohl Court made pertinent observations as to the reasons for sustaining the agreement. We may observe that precisely these same words apply to Messrs. Garfield and Sankin:

"As among the original incorporators there seems to be no reason in principle why they should not be permitted to retain the control of the corporation in which they have embarked their fortunes among themselves, or such of them as stand by the

vessel, where no question of a bona fide purchaser without notice is involved. In this court, where the intent of the parties is the thing sought to be enforced, every effort should be made to hold men to agreements into which they have voluntarily entered, where the same are not obnoxious to any law or policy, and upon the strength of which others have changed their position or circumstances, or parted with a valuable consideration. It is their business and their money which is involved. It is by their efforts that success is attained, if attained at all. Surely the public cannot be aggrieved, and individuals acting in accordance with equitable doctrines cannot be injured, because if they have no knowledge or notice of a fact, they are not injured by it."

"This act, of course, was designed for the protection of innocent purchasers of stock, in the open market or otherwise, and not at all as a shield by one with knowledge of a condition to unconscionably protect himself from the consequences thereof. As I have said, the defendant Goldstein was one of the incorporators of the company and has been an officer and director thereof from the time of the incorporation down to the present. He cannot plead innocence of the company's by-laws, whatever they may be worth, and does not undertake to do so. As has been said so often, laws are passed for the protection of rights and not for the purpose of aiding in the perpetration of fraud." (emphasis added) 124 A. at 120-121

Doss v. Yingling, supra, underscores the pertinent points when it makes these statements about the provisions of the agreement, and its relation to Section 15 (at 172 N.E. 803-804), with these observations:

"The weight of authority is to the effect that a corporate by-law which requires the owner of the stock to give the other stockholders of the corporation or the incorporators, in case the corporation is empowered to purchase its own stock, an option to purchase the same at an agreed price or the then existing book value before offering the stock for sale to an outsider, is a valid and reasonable restriction and binding upon the stockholders. Sterling Loan & Investment Co. v. Litel, 75 Colo. 34, 223 P. 753; People v. Galskis, 233 Ill.App. 414; Fopian v. Italian Catholic Cemetery Ass'n (1927) 260 Mass. 99, 156 N.E. 708, 709; Feldstein's Estate (1916) 25 Pa.Dist.R. 602; Nicholson v. Franklin Brewing Co. (1910) 82 Ohio St. 94, 91 N.E. 991, 137 Am.St.Rep. 764, 19 Ann.Cas. 699."

"The complaint in this instance is not predicated solely upon the validity of the by-law, but also upon an agreement entered into between the incorporators at the time the corporation was organized that when one incorporator desired to sell his stock he must first offer the stock for sale to the remaining stockholders at the then existing book value for a period of 10 days before offering it for sale to an outsider, which agreement was thereafter evidenced by the by-law heretofore set forth, observed through successive years by each incorporator upon the sale of the common stock of the corporation.

So whether we hold the restriction on the alienation on the common stock as valid under the provisions of the by-law or sustain the restrictions by virtue of an agreement entered into between the original incorporators, and evidenced by the by-law, which agreement and by-law were thereafter acted upon and observed by the stockholders of this corporation, the result is the same."

"Appellee Yingling was an original stockholder. He was an officer of the corporation --- the president. He knew the terms of the agreement and the provisions of the by-law which regulated the alienation of the stock of this company. He, through successive years, acted in accordance with the terms of the agreement and the provisions of the by-law in the sale and transfer of the capital stock of the corporation. He knew or should have known the law which provides that restrictions of the sale of stock shall be printed on the certificate of stock, and as president of the corporation, it was his duty to see that the by-laws of the corporation were made effectual, and in a court of equity it ill becomes him to invoke the protection of the statute above referred to." (emphasis added)

These are words of the leading decisions.

One is struck by the similar situation between the co-conspirator in this case, Mr. Garfield, and both Yingling and Goldstein in Doss and Baumohl, respectively.

Other authorities add substantial strength and support to the points noted by Doss and Baumohl.

In Tomoser v. Kamphausen, 307 N.Y. 797, 121 N.E.2d 623, 624 the Court of Appeals for the State of New York excluded applicability of Section 15 to a restrictive agreement between three shareholders. Tomoser is plainly persuasive.

The issue is made clear-cut by the recent decision of Simenstad v. Hagen, 22 Wis.2d 653, 126 N.W.2d 529. (1964).

This is so because in Simenstad, where the first purchase agreement was not referred to on the share certificate, the Court specifically alluded to and compared the decision of Larson v. Superior Auto Parts, Inc., 270 Wis. 613, 72 N.W.2d 316.

Simenstad expressly excluded Section 15 of The Uniform Stock Transfer Act from an agreement among shareholders. It pointed out that Larson declared unenforceable a corporation contract, between the corporation and the shareholders; it did not relate to an agreement among the shareholders themselves.

The matter is plainly put with these words from Simenstad v. Hagen:

"...neither sec. 183.14, Stats., nor the Larson Case have any application to the facts of the instant action. The statute deals with liens in favor of a corporation, and with stock restrictions whereby the option of first purchase is given to the corporation, and Larson v. Superior Auto Parts, Inc., supra, involved a contract between a corporation and its shareholders. The contract in the instant action, however, is an agreement only among four shareholders; it is not a contract between the corporation and its members, and sec. 183.14 and the Larson Case(s) do not apply to such a situation." (emphasis added) 126 N.W.2d at 533.

While there is a still further holding in Simenstad relating to riders on the certificates, it is wholly beside the ruling noted.

Simenstad states it and Mr. Sankin contends Simenstad makes sense.

Ward v. City Drug Company, 235 Ark. 767, 362 S.W.2d 27 (1962) is an additional authority for the Sankin position. There it was urged that a by-law, not endorsed upon the share certificate, violated the pertinent Arkansas statute, provision embodying Section 15. The Court rejected the argument. It assumed the by-law was invalid.

The entire discussion in Ward v. City Drug, including the precedent cited, warrants extended inclusion here:

"The appellant urges most strenuously that this By-law No. 1 was never endorsed on the stock certificate as required by § 64-315 Ark.Stats., (Section 15), and therefore the By-law lacks validity. Appellee urges, with equal tenacity, that the secretary of the corporation delivered a copy of the By-law to the Bank to be attached to the certificate; that Dr. McKelvey prevented such accomplishment; that both the Bank and Dr. McKelvey knew of the By-law; and that equity regards that as done which ought to have been done. There is respectable authority to sustain the position of each side; (citations); but we find it unnecessary to rest our holding on the validity, vel non, of the By-law because, at all events, Dr. McKelvey and the Trustee in bankruptcy of his estate are bound in law and in equity by the agreement which Dr. McKelvey signed with the other stockholders, as now to be discussed...At the time By-law No. 1 was adopted by the corporation on April 18, 1960, all of the stockholders of the corporation (and this included Dr. McKelvey) signed (the) instrument...Stockholders may make such

agreements between themselves, regardless of the validity of a bylaw of the corporation." (362 S.W.2d at 30-31, emphasis added)

The most recent reaffirmance of Doss and its principles appears to be in 1966 decision of State ex.rel. Huddleston v. Clarks Hill Telephone Company, ___Ind.App.___, 218 N.E.2d 154.

Taken separately, as in Doss, or Simenstad, or Ward, or even Costello; or taken together, as reflected in the cited cases within the decisions, the opinions we have examined positively point to the position stated: Section 15 of The Uniform Stock Transfer Act simply does not apply to first purchase or voting restrictions in contracts or agreements between the shareholders, qua shareholders.

If there were a residual doubt that remained, it should be resolved by reference to The Uniform Commercial Code.

In the District of Columbia, Section 15 is known as Title 28 Section 2915, *supra*.

That statute has, of course, been repealed and replaced. It has been replaced by Section 8-204 of The Uniform Commercial Code, enacted into District of Columbia law as Title 28 §8-204, passed on December 30, 1963 and effective on January 1, 1965.

It provides as follows:

"Unless noted conspicuously on the security a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it."

Two Official Code Comments are significant:

"A purchaser with actual knowledge of an unnoted restriction certainly has notice of an adverse claim (Section 8-304 and Comment). In that situation this section adopts the reasoning Baumohl v. Goldstein, 95 N.J.Eq. 597, 124 A 118 (1924), and Tomoser v. Kamphausen, 307 NY 797, 121 NE2d 622 (1954), rejecting the contrary holding of such cases as Costello v. Farrell, 234 Minn 453, 48 NW2d 557, 29 ALR2d 890 (1951)." 14 D.C.Code Ency. 438, 2 Anderson's Uniform Commercial Code 362 (emphasis added)

"Nor does (this section) it deal with private agreements between stockholders containing restrictive covenants as to the sale of the security as in In re Consolidated Factors Corporation, 46 F2d 561 (DCNY 1931," 14 D.C.C.E., at page 440, 2 Anderson's Uniform Commercial Code 363 (emphasis added)

Appellee Sankin underscores both of these quoted Official Code Comments. 14 D.C.C.E. 438, 440.

What the Uniform Commercial Code does, is plainly not to make "new" law. It merely restates the existing law as to private agreements, and applies the principle of actual knowledge to corporate charters, corporate by-laws and corporate contracts. Even in doing so in the latter instance, it no more than "adopts the reasoning of Baumohl v. Goldstein, supra, and Tomoser v. Kamphausen, supra , and rejects "the contrary holding" of the Costello v. Farrell decisions. We have observed that, properly analyzed, the Costello-type cases were by-law cases. Both explicitly in Costello and Age Publishing, and implicitly in their

progeny, this line of decision distinguished itself from cases involving shareholder agreements, to which, they noted, Section 15 did not apply. This Official Code Comment, therefore, merely reinforces, repeats, and recognizes that very point. It "adopts the reasoning" of Baumohl and Tomoser, even in by-law cases. It treats a "void" by-law as did the Courts that considered it to be a valid contract, binding on those with actual knowledge. That is, in part, the reasoning behind Baumohl and Tomoser.

The second Official Code Comment, above, states in plain unadorned words that this Code provision --- the repealer and the replacement for Section 15 --- "does not deal with private agreements between stockholders containing restrictive covenants as to the sale of the security as in In re Consolidated Factors Corporation 46 F2d 561 (DCNY 1931)." Obviously the noted Code Comment reference to Consolidated is to the kind of agreements there discussed, and here involved, namely the typical situation of a private agreement with first purchase right provisions. The one, presently reported decision on Sec. 8-204 appears to be in Willier and Hart, Uniform Commercial Code Reporter Digest, (Mathew Bender Co.), 1968 Supplement pp 181-183; Perugino v. Samson Land and Dev. Co. 39 D.& C.2d 500 (Pa. 1965), involving first purchase restrictions in an agreement, not appearing on the certificate. The Comment by the

Reporter upon the case, said this (p. 865): "The facts of the case seem to indicate that the restrictions were the result of a private agreement between the shareholders to which Section 8-204 would not apply."

Thus, we suggest, one more source of support to the Sankin position on Section 15 rests within the very terms of Official Code Comments on the present Uniform Commercial Code, in words that are as clear as they are convincing.

Section 8-204 of the Uniform Code replaced Section 15. But neither apply to shareholder agreements.

We have not suggested for one moment that, in general, the validity of restrictions on transfers of stock depends solely on whether they are found or appear in a shareholder's private agreement or a corporate by-law.^{1/}

^{1/} Rather than intrude upon the argument here, or in the section that follows, with a lengthy footnote, appellee Sankin has set forth in an Appendix to this brief (App. J) the cases and authorities dealing with when shareholder agreements may be struck down on other grounds. Since the brief of appellants Benn, 5410 and Pardo states they have "limited themselves to narrow...points" (p. 2), and thus have raised only the effect of Section 15, no attempt has been made in the Appendix to elaborate upon the interesting and extensive litigation and comment regarding voting and first purchase share restrictions generally. See also Opinion below and authorities cited, Sankin v. 5410 Conn. Ave., 281 F. Supp. 524, 550-555; 1 J.A. 55-60). It might be observed that, unlike their initial attempt at trial, appellants Benn-5410-Pardo do not challenge the voting restrictions. We suggest they do not do so because the authorities are so plain. (Appendix to this Brief, pp. J).

Only one point has been contended here --- that
Section 15 does not apply to private shareholder agreements.

We have here met, then, the first question raised by appellants Brief, but never discussed within it.

We have answered here, we think, whether Section 15 applies in any way, at all, to these facts.

We now pursue the question, in the portion of the Brief that follows, whether, even assuming arguendo the application of Section 15 (D.C. Code Title 28, Sec. 1915), these appellants (Benn-5410-Pardo), because of their flagrant fraud, may, in any event, employ that Section at all, as either a shield or a sword for the schemes at bar.

- B. Even If Section 15 Is Of The Uniform Stock Transfer Act (D.C. Code Title 28, Section 1915) Did Have Application To The Shareholder Agreements In This Case, Thereby Requiring The First Purchase Restrictions On The Shares To Appear On The Certificates, These Appellants, As Fraudulent Transferees, May Not Take Advantage Of That Statute.

The Court below primarily rested its decision regarding Section 15 upon the principle that in no event could that statute be used to protect a fraud. It quoted from Baumohl:

"This act (Section 15) was designed for the protection of innocent purchasers of stock, in the open market or otherwise, and not as a shield by one with knowledge of a condition to unconscionably protect himself from the consequences thereof....As has been said so often laws are passed for the protection of rights and not for the purpose of aiding in the perpetration of fraud. 124 A. at 121." (emphasis added, Sankin v. 5410, 281 F.Supp. at 533)

The Court properly relied on the cases urged; namely Doss v. Yingling, supra, and Baumohl v. Goldstein, supra.

Doss, Baumohl, and their offspring did not merely hold that Section 15 had no application to "agreements". They also ruled, as the trial Court noted, that persons with actual notice of a share restriction cannot, in equity or law, take advantage of that knowledge.

In short, all that we have observed before, and all that appears in the cases in the prior section of this Brief, applies with a fortiori force here.

The trial Court's Opinion referred to those cases appellants have largely relied upon at bar, namely Costello, Hopwood, Sorricks and Age Publishing (281 F.Supp. 552 n. 11; 1 J.A. 57).

It then observed that "...in none of those cases was the transfer the result of the fraud of the transferor and transferee" (281 F.Supp. at 552; 1 J.A. 57).

The trial Court properly dismissed Section 15 or any other attack upon the agreements with words quoted from Fontana v. Aetna Casualty and Surety Company, 124 U.S.App.D.C. 168, 171, 363 F2d 297, 300, words that really say it all: "This record discloses a cleverly conceived and boldly executed fraud to which judicial approval cannot be given." (281 F.Supp. at 552, emphasis added; I J.A. 57).

The Section 15 argument of these appellants, as the Court below noted, requires the Court to sanction the fraud. The shares, it will be recalled, had not even been transferred. In fact "5410" and The Defendant-Intervenors (including appellant Pardo) affirmatively requested relief by demanding in their "counterclaim" that the Court itself order the transfer of the shares (281 F.Supp. at 556, I J.A. 61).

The trial Court properly underlined its refusal to give judicial approval to this fraud, or indeed itself to carry it out, with these further words:

"...it is for the very purpose of aiding in the perpetration of the Garfield-Benn-5410 fraud that this Court is being asked to hold the transfer of stock to Benn-5410 valid because the Garfield-Sankin restrictive agreements were not disclosed on the stock certificates. In denying that request, this Court need look no further than the maxim that no man may take advantage of his own wrong'

Glus v. Brooklyn Eastern District Terminal,
359 V.S. 231, 232, 79 S.Ct. 760, 762 (1959)"
(281 F.Supp. at 553)

And so, appellees contend here, as they did below that for all of the reasons noted in Opinion, the Benn-5410-Pardo fraud cannot be shielded by Section 15.

And we think that there are still further reasons for that view.

They arise out of the very Brief filed by these appellants, Benn, 5410, and Pardo.

A significant statement in that Brief is the recognition of precisely what appellants' argument must mean.

What that argument must mean is set forth in a footnote (Appellants Brief p. 4, footnote 5).

That footnote is this: "It is not material to the question of the validity of the restrictions whether Benn's purchase offer was fraudulent or not."

That is precisely what appellants argument must mean.

That is precisely what this Court must hold, if it is to sustain the Benn-5410-Pardo position.

And to sustain that view, it must be ruled categorically that fraud, however outrageous, does not affect Section 15.

The trial Court observed that not in any of the cases cited below and noted here (Costello, Hopwood and Sorricks or

Age Publishing) was fraud involved.

It observed that it would not give judicial approval to, or carry forward, a fraud. Should this Court order its consummation?

But there are still other answers to add to what the Court said below.

Title 28, Section 2907 is such an answer.

Title 28, Section 2908 is such an answer.

Helms v. Duckworth, 101 U.S.App.D.C. 390, 394-395, 249 F2d 482 is such an answer.

These statutes cited also are part of The Uniform Stock Transfer Act. They are Sections 7 and 8, in pari materia with Section 15.

They provide as follows:

"Title 28, §2907. Rescission of transfer.

If the endorsement or delivery of a certificate

(a) was procured by fraud or duress; or
(b) was made under such mistake as to make the endorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) without authority from the owner; or
(d) after the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless

(1) the certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful; or

(2) the injured person has elected to waive the injury or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it." (emphasis added)

"Title 28, §2908. Rescission of transfer of certificate does not invalidate subsequent transfer by transferee in possession.

Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby." (emphasis added)

If fraud is immaterial, as appellants must argue, what becomes of Section 2907? It states that if endorsement or delivery of certificate is procured by fraud, then the Court may enforce the right to reclaim it, or rescind the transfer, and even enjoin further transfers.

Fraud is the difference. And Section 2907 will remedy fraud.

Appellants argument must mean that Section 2907 simply does not apply to any case or has no effect in any case.

Suppose for a moment this fraud were perfected sufficiently so that Mr. Benn or 5410 or Mr. Pardo actually received the Garfield shares. Or let us even consider the escrow here as "delivery."

Is there really any doubt that Mr. Sankin could have sought relief under either Title 28, Section 2907 or 2908, if he could prove fraud, whether or not the restriction was on the certificate?

What are the appellants going to do with these two statutes? Would not Section 2907, by itself, cause rescission in this or any fraud case? Even without any of the authorities cited, Section 7, defeats these parties.

What basis is there in Section 15 to ignore them?

What case authority discusses, rules upon, and specifically includes a fraud exception from the terms of Section 15?

What case authority allows appellants to ignore the plain language of Sections 7 and 8, supra, specifically and expressly affording relief under The Uniform Stock Transfer Act for fraud?

The Benn-5410-Pardo Brief does not set upon clear-cut, reasoned reasons, for its final reliance, but retreats to a comment from the Annotation in 29 A.L.R.2d 901 (Appellants Brief pp. 14-15).

In commenting on the relationship of Costello to Doss and Baumohl, the author of that Annotation observes this:

"These cases (Doss and Baumohl) are clearly distinguishable on their facts (from Costello), since in each the transfer was sought by an officer of the corporation who not only had knowledge of the restriction but also stood in a fiduciary relationship to the other shareholders." (29 A.L.R.2d 901, 904)

It is regrettable that appellants did not insert that sentence in their citation from the Annotation, because it focuses on the still further weaknesses of their "authorities".

Garfield, the co-conspirator with Benn and 5410, was precisely what "distinguished" Doss from Costello to this author.

Garfield was an officer, indeed the president. He himself requested that the restriction not appear on the certificate. He was the original signatory of the agreement. He was everything that Yingling and Goldstein were, and more.

And he held a high fiduciary duty. See Helms v. Duckworth, 101 U.S.App.D.C. 390, 394-395, 249 F.2d 482.

Whatever may be the rule elsewhere --- and it appears no differently in the decided cases --- the fiduciary duty of Helms is plainly demanded by our law. And Mr. Garfield transgressed that demand.

In Helms v. Duckworth, supra, this Court specifically ruled that in a "small 'two-man' corporation" --- precisely the Garfield-Sankin corporations at bar --- "the holders of closely held stock (in such corporations) bear a fiduciary duty to deal fairly, honestly, and openly with their fellow stockholders and to make disclosure of all essential information" (110 U.S.App.D.C. at 395, emphasis added). Cf. Smith v. Taylor 65 App.D.C. 40, 79 F.2d 165 (1935) Note, 72 Harvard L.Rev. 555.

Thus, with these facts --- a corporate officer and original shareholder as the transferor, a seller who held a fiduciary duty --- the case at bar is squarely within what the author of the Annotation stated were the "distinguishable" facts of Doss and Baumohl.

Sankin v. 5410 Connecticut Avenue Corporation is more than Doss v. Yingling; it is Doss with wilful fraud. It is more than Baumohl v. Goldstein; it is Baumohl with flagrant fraud. It is not, in short, Costello; nor does it bear any resemblance to appellants' authorities.

The decision below is therefore plainly right, whether because Section 15 simply does not apply at all, or because Section 15 is no shield to the fraud found in these appellants.

C. The Appellants Have No Equitable Standing To Receive Affirmative Relief From The Court.

The Court noted that 5410 and the intervenors sought

affirmative relief. They requested that an order issue registering the Garfield shares in the name of 5410 on the books of the corporations involved (281 F.Supp. 524, 556; 1 J.A. 61).

These appellants insisted below, as they insist here, that a Court somehow can be used not only to sanction a fraud it has already found, but to aid and carry it to its conclusion.

It is, we think, an absurd argument.^{2/}

To accomplish what these appellants urge, Judge Jones would not only have had to rid himself of his finding and omit all consideration of what he termed "a gross and wanton outrage", he would have had to join hands with appellants Benn, 5410, and Pardo --- however unclean theirs may be --- and order the transfer of the shares to them.

He did not do so for the reasons he stated: he could give no judicial approval to this fraud; he could not perpetuate it; he could not be used to complete it. See, Sankin v. 5410 Connecticut Avenue Corporation, authorities and discussions 281 F.Supp. 524, 552-553, 556-558, 568-569 (1 J.A. 57-63, 73-74).

^{2/} We think it clear that the defendant-intervenors have no standing to obtain relief for themselves because they are no more than alleged shareholders of 5410. Mr. Pardo, therefore, should not be before this Court. He, and they, gain or lose with 5410. They are bound by what binds 5410. They have no independent causes of action against Mr. Sankin. Their remedies are either as beneficiaries of a 5410 claim against Mr. Sankin or as claimants against wrongdoers to them within 5410. There is no relief this Court could give them. See: Waller v. Waller, 187 Md. 185, 49 A.2d 449, Green v. Victor Talking Machine Company, 24 F.2d 378. Annotation, 33 A.L.R.2d 473, and cases collected; W. A. Shaeffer Pen Company v. Lucas, 59 App.D.C. 323, 325, 41 F. 2d 117; Reiter v. Universal Marion Company, 173 F.Supp. 13, 15 (D.C.D.C.).

What he could not do, he rightly would not do.

The same reason for the same refusal prevails in this Court as it did below.

It mocks this Court to suggest that it must mandatorily sanction a fraudulent sale, and order that that fraud be fulfilled.

That is the effect, indeed the prayer, of Benn, 5410 and Pardo.

If it is not this, then what is the appeal all about?

And if it is this, it ought to be as firmly and finally rejected by this Court as it was in the Opinion below.^{3/}

II. THE COURT COMMITTED NO ERROR
IN DENYING BENN'S MOTION FOR A
NEW TRIAL OR IN ITS EVIDENTIARY
RULINGS.

Mr. Benn urges, in what appears to be the position to which he finally retreats, that the Trial Court should have granted his Motion for a New Trial because (1) The unsworn alleged statement of Janet Garfield after trial called her veracity into question; and

^{3/} See Fontana v. Aetna Casualty and Surety Company, 124 U.S.App.D.C. 168, 171, 363 F.2d 297, 300 (1966); Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232, 79 S.Ct. 760, 762 (1959); Cochran v. Burdick, 67 App.D.C. 87, 90, 89 F.2d 831, 834 (1937); Udall v. Littall, 125 U.S. App.D.C. 89, 96, 366 F.2d 668, 675 (1966); The Amiable Nancy, 16 U.S. (Wheat.) 546, 558, 4 L.Ed. 456 (1818); Lake Shore R. Co. v. Prentice, 147 U.S. 101, 114, 13 S. Ct. 261 (1893).

(2) testimony of one Joe Harris, in another case, reflected upon the findings regarding International Timber. (Appellant's brief 18-22).

Plainly, it really requires no citation to state the appellate rule to which no exception can be taken: The grant or denial of a Motion for a New Trial rests in the sound discretion of the Court; that discretion will not be disturbed absent plain abuse; and where there has been a trial by the Court and the Motion is concerned with "credibility", and thus demeanor, only an "arbitrary" denial could cause reversal. Cf. Ruppert v. Ruppert, 77 App. D.C. 65, 67, 134 F. 2d 497.

There is simply no showing of either an abuse or an arbitrary act. Indeed, the Court, considering the circumstances and history of this case, could have done nothing else. See 1 J.A. 241-266.^{4/}

^{4/} The so-called "statement" is not competent; it is unsworn; it is not properly identified as the voluntary statement of the alleged party and all of the alleged "identification" is the purest hearsay. The "statement", such as it is, was apparently obtained in June of 1967 and although the Master had just issued his ruling, no effort was made to submit the matter to the Court for re-opening of the evidence at the time of the alleged statement and before the final decision. The Statement, unsworn to and never filed in a competent or proper form earlier, only bears out what developed from Mr. Sankin's Opposition to the Motion. In response to his Opposition, Mr. Benn's Counsel filed a "Special Reply" and conceded that Attorney John Strickroot on behalf of Mrs. Garfield states that she contends "statement is false and her signature thereon is a forgery". Mr. Benn's counsel also conceded that "counsel for defendant Benn does not and cannot, state that Janet Garfield's statement is true and therefore a new trial should be granted." (Reply on Motion, App. this Brief, K-M): If Mrs. Garfield did in fact give the Statement, plainly she had an ulterior motive for denying any relationship with Mr. Benn in that she was then being sued for divorce by her husband and because she is purported to have said in paragraph 8 that the Garfield Apartments now belong to her. The whole statement even if given, is belied by the testimony in the case and even more, by the testimony of Mr. Silver in direct conflict with Mrs. Garfield's alleged statement that there was no involvement with Mr. Benn. (See also 1 J.A. 245, 132-136, 107, 108). Similarly it conflicts with the concessions of counsel that Mr. Benn had actual notice of the terms of the Agreements (1 J.A. 49-50; 281 F.Supp. at 544-545). As to Mr. Harris, he was listed as a witness for trial (1 J.A. 241-243).

Mr. Benn concludes his Brief with a complaint about his failure to be able to bring in certain hearsay testimony of one Joe Harris regarding International Timber, and with respect to certain documents he proffered. (See 1 J.A. 242 showing Harris as a witness; see also Harris receipt, 1 J.A. 244).

Only a full reading of the record could satisfy this Court that Mr. Benn received every consideration. That, however, should be unnecessary when one considers what Link, Whiting, Pardo and even Benn himself admitted about International Timber. As much to the point is the fact that his present counsel advance no theory upon which the evidence is admissible. (See Statement of Case, *supra*.)

Mr. Benn's problem, as a pro se party during part of the trial, was not with the Court or its rulings. Mr. Benn's problem was Mr. Benn. Mr. Benn was found unworthy of belief because Mr. Benn is unworthy of belief. He was, in this case, precisely what the Court termed him --- a person who "gave testimony without ^{5/} regard to truth." 281 F.Supp. 524, 544.

^{5/} It might be noted that Mr. Benn did have counsel at pretrial and at trial through the crucial testimony of Mr. Sankin and Mrs. Garfield (See volumes 1-7); he thereafter had the considerable aid of 5410's counsel, the defendant-intervenor's counsel and Mr. Pardo, and in fact adopted their defense (Tr. 5295, vol. 37; 11 J.A. 381); that it appears he and they had identical positions is apparent from this fact and the further fact that it was he --- Benn, personally --- who paid the attorneys in this case representing 5410 (Messrs. Hillard, Donahue, Chase and Seegmiller). See Objections to Master's Report filed by the present attorneys for Mr. Benn, p. 6; 1 J.A. 239-240). This Court may also observe that the trial judge carefully insisted that he would not relieve Mr. Lyman if Mr. Benn desired him as an attorney (1 J.A. 246-251). He has no complaint. Mr. Benn's "pro se" abilities appear rather unusual if one examines the Trial Brief and Trial Memoranda that he "filed pro se." (1 J.A. 201-214; See also Exhibits 1 J.A. 171-200).

III. CONCLUSION

This Brief should end where its Statement of the Case began.

The Trial Court stated the theme and the fact:

"The conduct of Garfield and Benn-5410... makes apposite here the long since spoken words of Justice Story: 'Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse'..." Sankin v. 5410, 281 F.Supp. 524, 568 (1968).

This Court should not permit that outrage to prevail.

This Court should affirm the judgment below.

Respectfully submitted,

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STATUTES INVOLVED

Title 28, Section 2915 - There shall be no lien or restriction unless indicated on certificate.

"There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

Title 29, Section 911 - Voting Shares, provides as follows:

"(a) Unless otherwise provided in Articles of Incorporation, each outstanding share shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders."

Title 28, Section 8-204 - Effect of issuer's restrictions on transfer.

"Unless noted conspicuously on the security a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it. (Dec. 30, 1963, 77 Stat. 735, Pub. L. 88-243, §1, eff. Jan. 1, 1965)."

Title 28, Section 2907. Rescission of transfer.

"If the endorsement or delivery of a certificate

(a) was procured by fraud or duress; or

(b) was made under such mistake as to make the endorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) without authority from the owner; or

(d) after the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless

(1) the certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful; or

(2) the injured person has elected to waive the injury or has been guilty of laches in endeavoring to enforce his rights.

Any Court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it."

Title 28, Section 2908.- Rescission of transfer of certificate does not invalidate subsequent transfer by transferee in possession.

"Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby."

Mr. Sankin noted what occurred on April 21, 1959, when he was first struck with the announcement of the "sale" with these words. (Tr. 235, Vol. 2):

"A. My immediate response was to tell Joe, "Joe, you can't do something of this type. We have a contract to the effect that you must first offer this stock to me." Mr. Benn immediately interrupted and said, "He has already sold it to me. Don't you understand English? I have bought control of these corporations, and I intend to exercise control." I turned to Mr. Benn and I said, "Mr. Benn, I don't know whether or not you have; but if you have, I just want to tell you that I have an equal voting arrangement with Mr. Garfield; it is in writing; and if, in fact, you have purchased this stock, it is subject to my equal voting rights."

An argument started to ensue. Voices were raised. I said there is no point to continuing this discussion, let me see if I can get our attorney on the phone. I picked up the phone; and, fortunately, Mr. Chaite was in his office. Mr. Chaite was on one end, Mr. Garfield on one extension, I on the second extension, Mr. Benn on the third extension. A rehash of this took place, and we decided that there was no point to continuing this conversation in the office in the presence of some other people who were there; and we all went down to Mr. Chaite's office.

Q. Now, for the record, Mr. Chaite is Mr. Arthur Chaite who was formerly a defendant in this case and is attorney for the two corporations, is that correct, sir?

A. That is correct.

Q. What happened in Mr. Chaite's office? . . .

". . . I again turned to Mr. Benn as I had in the car on the way to the office, advised him about the equal voting rights. He again reiterated that he purchased control, that he was an innocent purchaser for value. He showed me a copy of the negotiable instruments law, purportedly, that said he was an innocent purchaser for value; and he demanded -- I don't know if he demanded -- but the conversation with regard to the right of first refusal and the voting rights continually came into the conversation. And he actually saw the

stockbook with the stockholders agreement physically attached to the book; and before he looked at it he made an announcement that I am not going to be bound by anything, I just want to see it. And he did examine it; and, thereafter, the meeting broke up."

The April 21, 1959 meeting was described by Mrs. Garfield, as follows (Tr. 812-815, Vol. 6):

BY MR. GENN:

Q. And when you arrived at the Garfield apartment building, what transpired?

BY MRS. GARFIELD:

A. Mr. Benn told Mr. Garfield all along, as we were driving out, "Now Joe, you be quiet. Let me do the talking. I will handle Sankin." So we got to the Garfield and we met Mr. Sankin -- Mr. Benn, Mr. Garfield and myself. And Mr. Benn went in and introduced himself as having purchased the stock in the two corporations.

Q. You were present at that time?

A. Yes I was.

Q. Do you recall what was said?

A. Mr. Sankin said, "Joe, you can't do this to me." He said, "We've got an agreement. You just can't do this to me. You can't sell this without first offering it to me."

And all the time Mr. Benn was saying to Mr. Garfield, "keep quiet, Joe; I will do the talking. I am handling this."

Q. Do you recall anything else in that conversation?

A. Yes. Mr. Sankin repeatedly says that Mr. Garfield couldn't do this to him, and that he was going to call his lawyer. [Mr. Arthur Chaite]

So he called Mr. Chaite; and Mr. Chaite was on the phone, and Mr. Benn was on one phone, and Mr. Garfield was on another phone.

* * *

THE COURT: What happened after you had the telephone conversation with Mr. Chaite?

THE WITNESS: Mr. Sankin was to bring Mr. Garfield and I with him to Mr. Chaite's office.

BY MR. GENN:

Q. Was there a discussion at Mr. Chaite's office?

A. Yes there was.

Q. Were you present during the discussion?

A. Yes.

Q. Who was present during the discussion?

A. Mr. Chaite, Mr. Benn, Mr. Garfield, Mr. Sankin and myself.

Q. And what do you recall of the conversation, and would you state what conversations you recall at that meeting?

A. I recall that Mr. Benn went in and told Mr. Chaite that he was the new owner of this, my husband's stock; and he had bought 66 2/3 per cent of the Garfield and Sankin and the Julius Sankin, Inc., and that he purported to take Mr. Garfield's place. And he wanted to see the books. And Mr. Sankin continuously said, "He can't do this to me. Show them, Arthur, that he can't do this to me. We have an agreement that Garfield cannot sell to anyone else without first offering it to me.

Q. This was what Mr. Sankin stated?

A. Yes.

Q. Do you have an estimate as to about how long that meeting took?

A. I really haven't.

Q. Now when did the next meeting take place?

A. To the best of recollection, that was the end of the meeting with Mr. Sankin that day. And we continued with Mr. Benn that day until we went home to Miami that night.

APP. E

Q. Now after the meeting with Mr. Chaite, do you recall any discussions with Mr. Benn?

A. Yes. Mr. Benn constantly repeated, "Joe, I am handling it all, and you're lucky you're getting away from that thief. He would have stolen everything you had. It's just a matter of time now until you get your property back. Just sit tight and don't talk to anyone."

* * *

Mr. Benn's threats did not end with that April 21st meeting, as Mr. Sankin's further testimony plainly shows:

(Tr. 240-242, Vol. 2)

BY MR. GENN:

Q. Now, sir, when was the next contact with one of the parties or group of parties in this case?

MR. SANKIN:

A. On the 24th of April, the following day.

Q. What happened then?

A. I had a very nasty procedural problem.

Q. Well, Mr. Sankin, let me interrupt you a moment. Who was present at this particular meeting that you are referring to?

A. On the 24th?

Q. Yes.

A. Myself, Mr. Chaite, Mr. Benn and Mr. Saunders.

Q. Will you tell us what transpired?

A. The building was still under construction. It was getting towards its terminal stages. I had dozens and dozens of bills that had to be paid.

MR. SEEGMILLER: I object. This is not responsive to the question. What transpired was the question.

THE COURT: Go ahead and just tell us what transpired.

THE WITNESS: I made arrangements with Mr. Benn that he would be put in Mr. Garfield's position with regard to co-signing checks of the corporation and that he would be substituted for Mr. Garfield as a director and officer of the corporation. I made it very clear that this was being done solely for the purpose of continuing the business of the corporation, that I had nothing to hide and that I had no objection to him signing checks with me, but I also made very clear that this was done for that reason alone and that I was not recognizing the sale or recognizing him or recognizing his position.

There was a basic cleavage that was discussed several times, namely, would Mr. Benn recognize my equal voting position? And Mr. Benn's answer, no, he bought control, he was going to exercise control, and if I started fooling around, that he would put this corporation into receivership; and he knew that the appointment of a receiver --

MR. LYMAN: I object to this.

THE COURT: I sustain it.

MR. GENN: If the Court please, I think he is stating --

THE WITNESS: Mr. Benn told me that he could put it into receivership and that Mr. Benn knew that if a receiver was appointed that this would be a violation of the terms of our mortgage commitment and that the commitment could be recalled or rescinded; and that he, Mr. Benn, also told me that money was not important to him, that he had enough to take care of this building, and he didn't need any mortgage. So I just better behave myself.

Also at that meeting we signed some checks. I withdrew \$20,000 in the form of two checks, one for 12 and one for 8; and a check was given to Mr. Chaite for legal services; and a check was made out to Mr. Benn in the amount -- not to Mr. Benn -- to 5410 Connecticut Avenue Corporation, in the amount of \$24,000. This was necessary and agreed to because Mr. Benn said unless he received this money he would not agree to co-sign checks and permit this business to continue."

Mr. Dobin's testimony about the May 15th meeting is this
(Tr. 1442-1444, Vol. 11):

MR. DOBIN:

"Mr. Sankin, myself, Mr. Benn, and Mr. Whiting sat down in the lobby of this apartment house; and Mr. Benn and Mr. Sankin primarily -- I think Mr. Whiting didn't say a word until much later, and I didn't participate, in effect, while the conversation was in the lobby -- they started to talk about the building and the transactions which had presumably occurred between Mr. Benn and Mr. Garfield. Mr. Benn took out of his briefcase certain papers, which I never saw, but which he identified and showed to Mr. Sankin as documents related to this transaction. He didn't leave them with Mr. Sankin. He put them back in his bag.

At some point Mr. Sankin, I would imagine, if I remember correctly, raised the question of his voting rights in connection with stock he owned, and Mr. Benn and Mr. Sankin's voices rose considerably. I was embarrassed, and I suggested that perhaps we ought to move into Mr. Sankin's private office, because it looked like the meeting was going to take some time now; and we moved into Mr. Sankin's private office, the four of us, we were alone; and the conversation continued first about this business of the voting rights. I think I participated more when we got into this private room. Both Mr. Sankin and I told Mr. Benn that Mr. Sankin had certain voting rights in the stock as a result of an agreement with Mr. Garfield.

Mr. Benn said he didn't recognize those rights and my memory is he took out from his briefcase what appeared to be a code. I can't tell whether it was a negotiable instruments law or one of the uniform acts; but he read a portion of that act to us as evidence or argument as to why he wasn't bound by it and didn't have to recognize these rights. And I remember his using the words bona fide purchaser for value; and he said he was such a bona fide purchaser for value. In any event, he said he didn't recognize the rights.

The conversation then turned to the question of the amount which we understood, Mr. Sankin and I understood that Mr. Benn was paying for the purchase he had presumably made from Mr. Garfield.

And Mr. Sankin told Mr. Benn that he thought he had paid much more than the building was worth for his relative share as evidenced by the amount of stock he bought.

Mr. Benn said he agreed that the building was not worth as much as he paid. He told us that he was a wealthy man and that

he had a considerable amount of money and especially he had certain money, he said, outside the country; and that as a result of the money that was available to him outside the country, he was able to pay more than the building was worth if he could ultimately convert his interest into dollars."

AUTHORITIES REGARDING GENERAL VALIDITY OF VOTING RIGHTS
AND FIRST PURCHASE RESTRICTIONS

As to the validity of the plaintiff's position on legal interpretation and effect of a right of first refusal and voting rights see: Corbin on Contracts, Vol. 5A, Sec. 1174; O'Neal Close Corporations II, Sec. 7.08; Allen v. Biltmore Tissue Corporation, 2 N.Y.2d. 534 151 N.E.2d. 812, 814; In re Mathers Estate, 410 Pa. 361, 189 A.2d 586 at 591; Kaminsky v. Kahn, 13 App. Div. 2d 143, 213 N.Y.S. 2d 786, 788; Model Clothing House v. Dickinson, 146 Minn. 367, 178 N.W. 957; Ringling Brothers, etc. v. Ringling, 29 Del. Ch. 610, 53 A. 2d 441 (1947); Sterling Loan v. Litel, 75 Colo. 34, 223 P. 753, 755; Trefethen v. Amazeen, 93 N.H. 110, 36 A.2d. 266. See also cases cited infra all applying the principle.

As to support for plaintiff's position on the validity and enforceability of the price provisions involved, see Gutch v. Meccia, 60 A.2d 649, 650, 142 N.Y. Eq. 430; Howard v. Fitzgerald, 58 Wash.2d 403, 353, P.2d 366; Parker v. Murphy, 146 S.E. 254, 257-8, 152 Va. 173 (1929); R. F. Robinson v. Drew, 144 A.67 68-69, 83 N.H. 459; Schwartz v. Petty, 140 A.2d 63 (D.C.Ct. App.); Williston on Contracts (3rd Ed. Jaeger), Sec. 41, pp. 129-131; Sec. 47, 153-155

See also annotations, 13 A.L.R.2d, 807 at 812; 29 A.L.R. 2d, 901; 45 A.L.R.2d, 799, 801-802; 61 A.L.R.2d, 1318. See also 3 Williston (2d Ed.) § 844; 5 Williston on Contracts (2d Ed.) §1436; 2 Pomeroy's Equity Jurisprudence 4th Ed., §899; Corbin on Contracts, Vol 5A, §1174; Cataldo, Stock Transfer Restrictions and the Closed Corporation, 37 Va. L.Rev. 229 (1959); Hornstein, Stockholder Agreements in the Closely Held Corporation, 59 Yale L.J. 1040 (1950); O'Neal, Close Corporations, Callaghan & Company, 1958, Vol. II, sec. 7.09, pp. 13-14, and O'Neal, Restrictions on Transfer of Stock in Closely Held Corporations; Planning and Drafting, 65 Harv. L. Rev. 773 (1952).

As to the binding effect of the restrictions upon those with notice, in addition to cases in Brief, see: Bator v. United Sausage Co., 80 A.2d 442, 138 Conn. 18; Bishop v. Vose, 162 F. Supp. 92, 95; Black and White Cabs v. Smith (Mo.) 370 S.W. 2d 669, 671; Boswell v. Buhl 63 A. 56, 213 Pa. 450; E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N.W. 2d 228, A.L.R. 2d. 774, 790; Federal Services Finance v. Bishop National Bank (C.A. 9), 190 F.2d 442, 444 n.3; First National Bank of Canton v. Shanks, 73 N.E. 2d. 93, 97, 99 (Ct. Com. Pl. Ohio); Katcher v. Ohsman, 97 A.2d, 180 26 N.J. Super 28; Krauss v. Kuechler, 300 Mass. 346, 15 N.E.2d. 207, 117 A.L.R. 355; Palmer v. Chamberlin, 191 F.2d 532, at 536-539; In re West Waterway Lumber Company, _____ Wash. _____, 367 P.2d. 807, 811, 812.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS SANKIN

v.

5410 CONNECTICUT AVENUE
CORPORATION, et al.

Civil Action No. 1493-59

JAMES T. BENN

v.

JOSEPH A. GARFIELD
JANET GARFIELD

Civil Action No. 4002-60

SPECIAL REPLY OF DEFENDANT BENN TO OPPOSITIONS TO MOTION FOR
NEW TRIAL, TO AMEND THE JUDGMENT, AND FOR OTHER RELIEF

The Oppositions filed herein by the plaintiff and defendant Garfield to this defendant's Motion for New Trial, To Amend the Judgment, and for Other Relief are directed either to substantial matters raised by the motion, which must be decided in the discretion of the Court, or to the issue of due diligence in presenting the evidence. One further matter, however, raised in plaintiff's Opposition, tangentially bearing on the issue of due diligence, requires a special and specific answer.

Plaintiff makes gratuitous and uncalled for observations on the conduct of counsel for Benn and 5410 Corporation in presenting this new material to the Court. Counsel for Benn does not need to be reminded by the plaintiff of his obligation to this Court. Counsel for Benn admits freely that he has not had any personal conversations either by telephone or in person with Janet Garfield. He has, however, spoken on the telephone both to Mr. Roman and Mr. Vernell in Florida, and Mr. Appel in Washington, who have reiterated the substance of their affidavits.

The delay between Janet Garfield's statement and the filing of this motion, which Sankin and Garfield both imply amounts to a lack of due diligence, arises precisely because counsel for Benn was concerned that the Garfield statement was not notarized and hence might be untrue or repudiated by her. It was for this reason counsel for Benn sought additional independent

methods of verifying whether she had ever made the statement in question or admitted the truth of its contents; such verification was found in the other affidavits submitted with the motion.

Her failure to notarize the statement on two occasions raised grave doubts in counsel's mind whether Janet Garfield (a) had made the statement, or (b) if she had made the statement, whether it was true. However, having regard to the fact that the Garfield statement raised inconsistencies with her prior testimony, and having further regard to the fact that she had not notarized and returned the original, counsel determined, it is submitted correctly, that direct contact with a hostile witness and adverse party whose credibility was to be called into question would produce no reliable results. Clearly, the principal initial issue is whether the statement was made, not its truth, since as an admission, it would affect the weight of her testimony, even if untrue. What was required was some independent corroboration of the authenticity, if not the truth, of the statement; such corroboration was found in the affidavits of Roman, Vernell, and Appel. Counsel knows of no requirement to alert a hostile witness and adverse party of the possibility that her credibility may be attacked in subsequent trial proceedings on the basis of a statement attributed to her in affidavits which counsel has every reason to believe are genuine.

Counsel for Benn has been informed by Mr. John C. Strickroot of Fowler, White, Collins, Gillen, Humkey and Trenam, 501 City National Bank Building, Miami, Florida, who claims now to represent Mrs. Garfield, that she asserts that the statement is false and that her signature thereon is a forgery. This is contrary to the finding of Appel and is a matter to be resolved by the Court, not by counsel.

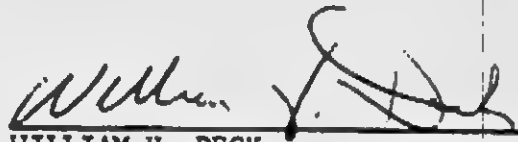
In judging plaintiff's unnecessary contention concerning the responsibility of counsel in this case, the Court is also requested to weigh carefully the tone of defendant's Motion for New Trial. Counsel for defendant Benn did not couch this motion in terms of the undeniable certainty of the truth of Mrs. Garfield's current statement. Counsel was well aware that in a case

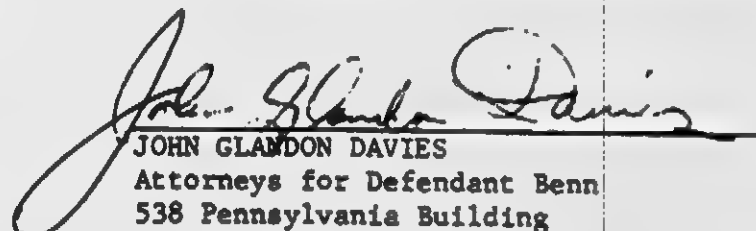
of this kind no statements may be taken at face value, but counsel was equally aware that he would be remiss in his duty to the Court and to his client if he failed to acquaint the Court with the existence of this statement as supported by the other affidavits. Surely, the plaintiff is not suggesting that because it would be virtually impossible to determine directly from Janet Garfield what her present version of the story is, this statement should have been ignored and not brought to the attention of the Court, particularly in light of the affidavits submitted therewith. Counsel for defendant Benn does not and cannot state that Janet Garfield's statement is true and that, therefore, a new trial should be granted. On the other hand, counsel owes a duty to this Court and his client to point out the existence of this statement and the fact that witnesses have attested to, at least, an oral admission of its truth and to the authenticity of the signature appearing thereon, all of which may induce the Court to exercise some or all of its broad discretionary powers under Rule 59.

Finally, on the issue of due diligence, the Court also is requested to take into account that a former motion of this defendant for reconsideration of some of the issues in this case was denied with a specific indication that it was premature, the appropriate time for raising such matters being after judgment as permitted by Rule 59. Surely, this defendant is not to be penalized for following guidelines laid down by the Court.

CONCLUSION

It is submitted that the Court should not permit this seemingly needless ad hominem argument raised in plaintiff's opposition to prevent the Court from exercising such of its powers under Rule 59 as it deems appropriate.


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REPLY BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO

Appellants

v.

JULIUS SANKIN

Appellee

No. 21957

JAMES T. BENN

Appellant

v.

JOSEPH A. GARFIELD, et al.

Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT OF APPEALS
FILED MAR 20 1960

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037 and 22038

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO

Appellants

v.

JULIUS SANKIN

Appellee

No. 21957

JAMES T. BENN

Appellant

v.

JOSEPH A. GARFIELD, et al.

Appellees

REPLY BRIEF FOR APPELLANTS

ARGUMENT

A. THERE IS NO VALID DISTINCTION BETWEEN RESTRICTIONS ON
ALIENATION CREATED BY CORPORATE CHARTER OR BYLAWS AND
THOSE CREATED BY PRIVATE AGREEMENT.

To meet appellants' contention that the restrictions purportedly
imposed by the stockholders' agreement between Garfield and Sankin were
invalid because not inscribed on the stock certificate as required by

Section 15 of the Uniform Stock Transfer Act, appellee Sankin argues that a distinction must be drawn between restrictions created by corporate bylaws or charter and those originating in private agreements entered into between shareholders. To lay the groundwork for this argument, Sankin asserts that Section 15 is intended to apply only to liens or restrictions imposed by a corporation, but a plain reading of Section 15 makes it quite clear that the section prohibits and limits the enforceability of any restrictions whether imposed by a corporation "or otherwise" unless the right of the corporation to such lien "or the restriction" is stated upon the certificate. Quite clearly, what is meant here is that, quite apart from liens in favor of a corporation, the restriction, how ever created, must be stated upon the certificate before it can be enforced against purchasers with or without notice of the restriction. Section 15 creates two distinct species of rights which are enforceable only if inscribed on the stock certificate. These rights are (1) liens in favor of a corporation, and (2) restrictions on transfer "otherwise" created. It is the latter rights which are involved here.

Appellee Sankin attempts to sustain the distinction by pointing out that all but one of the cases cited by appellants concern restrictions created by corporate bylaws or charters and that only Straights Transit, Inc. v. Union Terminal Piers, 370 Mich. 274, 121 NW2d 679 (1963), reflects an instance where a private stockholders' agreement was held unenforceable in the absence of the required endorsement on the stock certificates. Sankin would like the Court to conclude from this that Straight Transit is an isolated case and that the main stream of authority supports his distinction. This is not true.

For example, in General Development Corporation v. Robert L. Catlan, 139 So. 2d 901 (1962), a Florida Appeals Court expressly held that the Florida version of Section 15 required that its terms be implied into a private agreement between a corporation and its employee whereby the employee had privately covenanted that he would not sell or distribute the shares represented by the certificate without first offering same to the corporation. This conclusion by the Florida Court makes it quite clear that for purposes of Section 15 the fact that the restriction originates from a private contract rather than in a corporate bylaw is immaterial. Again, in Altman v. American Foods, Inc., 138 SE2d 526 (1964), the Supreme Court of North Carolina, faced with a comparable situation of an employee who attempted to sell and transfer shares of stock in violation of a private covenant not inscribed on his stock certificates, but entered into between him and the company, was not required to observe the restriction and could, in fact, either sell freely as he chose or compel the company to buy back his stock. A 1966 decision of the Court of Appeals of Michigan, following the authority of Straights Transit, supra, and Sorricks v. Consolidated Telephone Company, 340 Mich. 463, 65 NW2d 713 (1954), rejects the argument that a private agreement between shareholders is to be treated differently from an action of the corporation in determining the effect of Section 15 and further expressly rejects the finding of the District Court in this case that the intent of Section 15 is to protect the innocent and unwary.

B. ASSUMING ARGUENDO THE VALIDITY OF SUCH A DISTINCTION
SECTION 15 SHOULD BE MORE STRICTLY CONSTRUED WHERE PRIVATE
SHAREHOLDER AGREEMENTS ARE INVOLVED.

The foregoing rebuts appellee's contention that there is a viable distinction between restrictions created by corporate bylaw or charter and those created by private agreement, but even assuming the substance of such a distinction, appellants contend that, if anything, there is a far greater public necessity for strict adherence to the terms of Section 15 in the case of private shareholders agreements than in the case of restrictions created by corporate action. It is abundantly clear that the charter and bylaws of a corporation, required by most state laws to be maintained on file in places of public notice, provide a potential purchasing shareholder with far greater protection against undisclosed restrictive covenants than private shareholders agreements which may not be available for examination by any outsider. For this reason, appellants urge that if the distinction raised by appellees has any merit whatever it merely points to the fact that in the instant case where a private shareholder agreement is involved the necessity to protect purchasers, with or without notice of the restriction imposed by the private agreement, is greater than in the "bylaw cases." Surely, this is the situation which the "or otherwise" language of Section 15 seeks to reach.

C. IF THE UNIFORM COMMERCIAL CODE AMENDMENT TO SECTION 15
CODIFIED EXISTING LAW, APPELLANTS' VIEW SHOULD BE UPHELD.

Appellee Sankin's statement that the amended language of Section 8-204 of the Uniform Commercial Code was designed as an expression of

existing law rather than a revision of the law as then existing does not advance his argument one step. The reference of the Uniform Commercial Code commentators to the case of In Re Consolidated Factors Corporation, 46 F.2d 561 (DCSDNY 1931), makes this quite clear. If the object was to exclude from the effect of the revision "private agreements between stockholders containing restrictive covenants as to the sale of the security," it then becomes plain that the law remains as it was prior to the Uniform Commercial Code when Consolidated Factors Corporation was in effect. The plain and unavoidable holding in Consolidated Factors is as follows: As a general rule a restrictive covenant on a chattel or other personal property does not follow it into the hands of third persons whether such persons have notice of the covenant or not.

Based on the foregoing, it is quite clear that if appellee Sankin is correct that the amendment to the Uniform Commercial Code merely codified existing law then his argument fails by its own terms, because in regard to restrictive covenants on chattels, the existing law plainly provided that such covenants would not follow chattels into the hands of third persons whether there was notice of the covenants or not.

D. THE DISTRICT COURT'S JUDGMENT FAILS TO EFFECT A COMPLETE RESCISSION BETWEEN THE PARTIES AND LEAVES MANY VITAL ISSUES UNRESOLVED.

It is important to bear in mind the practical consequences of a finding that the share certificates of Garfield and Sankin would pass to any purchaser with or without notice free and clear of restrictions not properly endorsed on the certificates. By making such a finding, the Court would not


necessarily deny Sankin such relief as he may be entitled to for any fraud or breach of contract which he may have suffered. It would mean, however, that the beneficial ownership of the 5410 Connecticut Avenue apartment project vested in Benn at the time of Benn's receipt of the stock from Garfield in 1959 and subsequently in the hands of the five intervenors. The District Court has found that the intervenors did not participate in the fraudulent conspiracy against Sankin and yet their rights are left in limbo.

The substance of the District Court's opinion is to effect a rescission of the dealing between Benn and Garfield, and, necessarily, between Benn and the intervenors in order to place Sankin in the position that he would have occupied had his rights of first refusal never been jeopardized by the intervention of Benn into the situation. A necessary ingredient of any such equitable remedy of rescission is that all the parties be placed in status quo ante as though the dealings set aside by the Court had never been entered into. On this basis, the District Court's opinion does not deal fairly either with Benn or the intervenors, all of whom parted with property in connection with this transaction, the value of which property may be in question, but which should be returned. In the case of Benn, the District Court's opinion should have provided for the return to him of the stock of International Timber Company, acknowledged by all parties to be worth at least \$10,000, if not the value claimed by Benn on acquisition of Garfield interest. Insofar as the intervenors are concerned, they have admitted delivering to Benn \$110,000 in cash and \$440,000 in promissory notes, none

of which property, whatever its value, is provided for in the District Court's opinion.



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APPELLANT BENN'S PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21956, 22037, and 22038
21957

JAMES T. BENN
5410 CONNECTICUT AVENUE CORPORATION
JOSEPH PARDO
Appellants

v.

JULIUS SANKIN
Appellee

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 18 1969

Nathan J. Paulson
CLERK

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Attorney for Appellant
James T. Benn

Appellant Benn, through his counsel, respectfully requests that this Court reconsider its decision of April 4, 1969, affirming the decision below upon the following grounds.

1. Only three persons could know the story, said the district judge (A.543); it largely had to be told through their mouths. One, the trial judge entirely disbelieved (A. 49). The second from his own mouth confessed to be a fraudulent schemer, violating his fiduciary duty, deliberately lying (A.50); he was found to be an "evil-doer" (A.64). The third furnished the cornerstone, foundation and structure of the District Court's decision; her testimony was found to be forthright; she looked and acted as if she told the "truth fully, frankly and freely" -- to her story the district judge gave "full credence." (A.49). It was she in whom the district judge placed credence "particularly" (Tr.6062).

Yet, this witness, whose testimony so particularly relied upon, furnished the thread upon which a fraudulent scheme was found, has admitted to perjury, has admitted that despite her beguiling appearance her story; upon which the District Court placed so much weight, was based upon deliberate fabrication -- at least in part -- and it is respectfully submitted, in material part. Further, she now admits that her perjury was deliberately contrived "at the demand and under coercion of her husband" to help him in this litigation, and as a part of this scheme of perjury, "to get the court's sympathy" (A.104, 107).

Janet Garfield's perjury was uncovered only after the trial in their case had ended. It was timely presented to the District Court in a motion to amend the findings or to permit the taking of additional testimony to examine more fully into these matters

(A.82).¹ The District Court denied these motions without opinion.²

The appeal to this Court was based in part upon the denial of these motions. This Court affirmed this denial upon two grounds, ruling specifically that the newly discovered evidence of this perjury was "of dubious significance" and that it was "far from newly discovered." On both elements, it is respectfully submitted, that this Court committed clear error.

a. The Significance of the Evidence

As noted, the trial court had before it a case depending primarily upon credibility. Although there is much documentation in the record, it told a story of fraud only when tied together by oral testimony. As the trial judge in his oral opinion shortly after termination of the trial said, "By the very nature of this case, it must be decided in great part on credibility" (Tr.6058).

The District Court found that the story rested on these people-- James Benn, Joseph Garfield and Janet Garfield. As the Court said, "those three are the only persons in a position to know whether it was with fraudulent motivation that they planned and acted" (A.48, emphasis added). Of those three, Janet Garfield was believed "particularly" and any doubts as to whether to believe Benn or Joseph Garfield were resolved in the latter's favor because Janet's testimony agreed with her husband's and was in "direct conflict" with that of Benn (A.49). Thus, the central and crucial nature of Janet's testimony is clear, and the critical role that her cred-

1. Although the motion itself is entitled "Motion for New Trial, to Amend the Judgment, and for Other Relief" (A.82), the memorandum in support thereof is more specific in the relief requested. (A.96).

2. As shown on the Civil Docket in the District Court, pp.39, 40 the motion was filed Jan. 29, 1968, and denied Feb. 1, 1968.

ibility played is manifest. For this Court to rule that the issue of her credibility is of "dubious significance" is to ignore the central thread of the Trial Court's opinion.

And that the perjury that she admits is far from peripheral is clear from an examination of the record:

(1) On at least two occasions, the district court drew a picture of an illicit romantic relationship between Janet Garfield and Benn a part of the court's apparent view that Benn used the relationship to wangle his way into the apartment house project (A. 35,47). This finding was based solely upon Janet Garfield's lengthy testimony that there was an "intimate relationship," an "amour" between her and Benn (A.340), that they were in love and planning to get married (id.), that they met at "motels" (Tr. 816), and that they were carrying on an "illicit relationship" (Tr.931). This testimony she has repudiated, stating it to be false, to have been contrived by her husband "for the purpose of getting the Court's sympathy for my husband" -- and that it was all "not true" (A. 159-60).

(2) A central part of the fraud found to have been engaged in by Benn concerned the stock in International Timber Company and its claim on the Surinam Timber Concession (A.49). The trial court found that Mr. Garfield had never heard of International Timber until May 4, 1959, when, the court found, Benn delivered to him a stock power in that company. This finding was based at least in material part upon Janet Garfield's testimony that "we had never heard of the International Timber Corporation until that day" (Tr.866). But in her statement of repudiation, Janet Garfield declared that two weeks earlier Benn delivered to her husband, in her presence, a large folder of papers relating to the Surinam Timber Concession which formed the underlying value of International Timber (A.105).

(3) A significant issue centered on the purloining of Mr. Benn's briefcase by Mrs. Garfield on May 8th. At trial Mrs. Garfield testified emphatically that her husband played no part in the taking of the briefcase and had no knowledge of it (Tr. 5400). Mrs. Garfield now avers that this testimony was false, that her husband had knowledge and indeed "pre-planned" the episode (A.106).

(4) At trial, Janet Garfield swore that all of the money belonging to Benn and found by her within the purloined briefcase was returned on May 9, 1959 (Tr. 914, 954, 5442, 5445). Her later statement, however, declares this to be false, stating that her husband refused to return all the money to Benn and that on May 13th they still had \$60,000 of it (A.106).

(5) An important credibility issue developed over whether a \$1,000 check given by Mr. Garfield to Benn on April 20th was paid by Garfield into the newly formed 5410 Corporation, with the check made out and endorsed in a false manner to indicate the receipt by Garfield of cash from Benn as a part of the fraudulent scheme, or whether Benn in fact did cash a \$1,000 check for Garfield (A.37,38). At trial Janet Garfield testified explicitly that her husband received no cash from Benn for the check: "he got nothing" (Tr.933). That this was perjury is admitted in her later statement that "Mr. Benn in turn gave my husband ten (10) one hundred (\$100) dollar bills" for the check (A.105).

(6) Also central to the fraud held to exist was the finding that Benn on March 14th knew of and saw the Garfield-Sankin stockholder agreements concerning voting rights, for this was the starting point of the whole alleged fraudulent scheme (A.35,48). And so Janet Garfield testified (Tr.765). This now stands repudiated, as she states unequivocally that Benn was not informed of these agreements

until May 21, 1959 (A.105).

In addition, Janet Garfield tells how her husband and the plaintiff, Julius Sankin, and their common relative, Mr. Mankes, schemed from May 6th on concerning how to get Benn (A.104,106).

Thus, in point after point, Janet Garfield declares her own perjury and indicts her husband in a conspiracy of perjury. Should her statements of June 1967 be true, the entire processes of justice have been subverted by a scheme of lies -- in a case where credibility was the central issue. In this situation, it is respectfully submitted, the trial court's refusal to reopen the case to reexamine his conclusions as to credibility constitutes a clear abuse of discretion. And this Court's characterization of this evidence as being of "dubious significance" constitutes, it is respectfully submitted, an acquiescence in the closing of the doors of justice to the very purpose for which courts exist -- the search for truth.

b. The timeliness of the Motion to consider the evidence.

In the second of this Court's two paragraph per curiam affirmance, it is stated that the "newly discovered evidence," which was one of Benn's grounds for seeking a new trial, "in any event, appears to be far from newly discovered." Since appellant manifestly, and without contradiction, discovered the evidence of perjury only after the trial concluded, this Court's holding that it does not meet the test of newly discovered evidence can only refer to the timeliness with which appellant presented the matter to the trial court.

To be timely submitted, such evidence as Janet Garfield's repudiation of her trial testimony should be called to the court's attention as soon as possible following discovery. This is precisely what Benn did, for, as can be easily demonstrated, his motion for

new trial was the earliest possible time he had reason to believe that the trial court would entertain any motion to consider additional evidence. On February 2, 1966 (a year after the trial on liability had ended and while the damages question was pending before a master upon a reference) Benn moved for leave to present new evidence. The trial court on February 16, 1966, denied that motion, ruling that it constituted "in effect a motion for a rehearing or new trial on the issue of liability," and then concluding:

After the Court reviews the Special Master's findings, conclusions and report and considers any objections filed with respect thereto, it will enter its formal findings, conclusions and judgment in these consolidated cases. As provided in Rule 52 of the Federal Rules of Civil Procedure, any party after the entry of judgment may move the Court to amend its findings or make additional findings and amend the judgment accordingly. Thus, Defendant Benn's motion to reconsider major issues and points involved is premature and will be denied.

Thus we have shown that in the circumstances of this case the applicable test of whether evidence is "newly discovered" when presented to the court, turns on the issue of whether its presentation was timely, i.e., presented as soon as possible. To dismiss this evidence as being "far from newly discovered" when it was presented to the trial court as soon as that court (under its order of February 16, 1966) allowed, makes a penalty out of following the explicit directions of the trial judge. This, we are sure, this Court did not intend.

c. Conclusion. It is therefore respectfully submitted that this Court erred in failing to take into account those elements of Benn's appeal which would have indicated rather persuasively, we think, that the trial court did, in fact, abuse its discretion. In all good conscience, this Court should reexamine its basis for what we respectfully submit appears to be an off-hand dismissal of substantial contentions. Justice demands no less.

2. In the disposition of the numerous counter and cross claims among the defendants and intervenors, the trial court took the posit that an equity court would "not grant relief to one who has so soiled his hands" (A.64)3/. For this reason the court, finding that Garfield "with Benn-5410 was an evildoer" (id.), stated that it would grant no relief to Garfield who sought first to rescind "all transactions and uncompleted transfers which had been entered into and agreed to by Garfield [and] Benn-5410" or alternatively to obtain a declaration that they were null and void (id.; see also Garfield's Proposed Findings of Fact and Conclusions of Law, filed Jan. 18, 1968). While there is no doubt that the Trial Court held consistently to the position that it would not aid Garfield (or the other parties to the fraud on Sankin) in his dispute with Benn, a close analysis of the facts as found by the Court reveals that in fact Garfield was aided, and in a manner in which, regardless of any wrong done by Benn or the credibility given the latter's testimony by the Court, the result unjustly enriches Garfield vis-a-vis Benn.

The net result of the major transactions between Garfield and Benn-5410 are thus: Garfield transferred his shares in Garfield and

3. See also A. 66 ["Let him stay where he placed himself. . . . Applying the clean hands maxim Garfield will be left where he placed himself - a participant with Benn-5410 in a fraud."]; id. [noting that intervenors' failure to look a gift horse in the mouth was the genesis of their trouble, "This Court leaves [them] with their purchase . . . A.71 [reversing its earlier position on the question of ownership of 5410 stock (Tr.6061), the Court "On reflection . . . concluded that to rule that Garfield was the owner . . . would be in error . . . because to grant it would violate the clean hands maxim."]; A.62 [the same rule applied in intervenors' claims against Garfield].

Sankin, Inc. and Julius Sankin, Inc., and assigned his notes receivable from the former corporation (given him to secure his case advances for the conduct of the corporation's business), to Benn-5410; in exchange therefor, Garfield received 100 shares of 5410 stock and full rights of ownership in 2,000 shares of International Timber.⁴

What the Trial Court did -- and what this Court approved -- was, First, to make any claim Garfield might have to full ownership of 5410 totally worthless (A.66). Thus, what Garfield received from Benn-5410 was, in effect, only the International Timber stock. Second, the sale by Garfield to Benn-5410 of the former's 2/3 ownership in the corporations (the balance of which was owned by Sankin) was held void (A.61,65). Third, the assignment by Garfield to Benn-5410 of the former's receivable from Garfield and Sankin, Inc. was held invalid as being without consideration (A.65).

If the Trial Court's assumption that the timber rights (which were the essence of International Timber's stock value) held by Garfield were, in fact, worthless, there might have been no error here. But as has just been demonstrated, Garfield was, in fact, granted the most important relief he sought -- rescission and/or avoidance of his dealings with Benn-5410. Thus, while purporting to deny Garfield's prayer for relief, the Trial Court, with this Court's acquiescence, put Garfield in a position in which he would (1) obtain the fair value of the stock which he sold to Benn-5410 with the

⁴ The question of whether Garfield ever obtained actual possession of the stock certificate is subject to doubt. That his right thereto vis-a-vis Benn is not. The Court would go no further than to opine that it was virtually worthless. A.65; see also Tr. 6056.

intent to defraud Sankin -- from Sankin,⁵ and (2) avoid the loss of his advancements to Garfield and Sankin, Inc. by virtue of their assignment to Benn-5410,⁶ while at the same time (3) allowing him to enjoy the incidents of ownership in International Timber, whatever its value. Like it or not, a court of equity did grant relief to one (Garfield) who came before it with soiled hands. Once the Trial Court adjudicated the rights of the parties just outlined, it was granting relief. To do so for one of two parties who appear before the Court on equal footing, but not the other when the latter is entitled to relief, is unjust in any case. In the instant case, it is all the more unjust since the Court's failure to deal with the last of the four items mentioned above -- the International Timber stock -- was based upon an opinion which is wholly unsupported by the evidence, and which failure, we respectfully submit, requires a modification of the Trial Court's order.

The critical error in the proceedings below was the persistent denial of every attempt made by defendant Benn to introduce evidence which would have established that the Surinamese timber rights, 50% of which International Timber had an option to purchase, were in fact more than adequate consideration for the \$800,000 value received. As early as June 5, 1959, in a hearing before Judge Pine on a motion for preliminary injunction, plaintiff's counsel referred to "worthless stock power in a Panamanian corporation." Tr. Hearing on Motion, June 5, 1959, D.D.C., Civ. Act. No. 1493-59 (Sankin v. 5410 Conn. Corp., et al.) at 17. And following the conclusion of the trial -- but

5. In fact, Garfield has been enjoying the benefits of the Trial Court's ruling since Jan. 29, 1968, on which date he was paid \$352,063.38 pursuant to the Court's order. Docket, p. 39.

6. Nothing in the Trial Court's opinion suggests these advances are not recoverable by Garfield from Garfield and Sankin, Inc.

before submission of the case to the Special Master -- the Trial Court rendered its oral opinion on the issue of liability (Tr. 6052-63), indicating clearly that, since the option was exercisable for \$10,000, the "two thousand shares of International Timber . . . , in the Court's opinion, was of little if any value." Having reached this conclusion a full 2-1/2 years before rendering its formal judgment,⁷ the Trial Court could not have been but fully aware of the critical relevance of the issue of the timber rights' value when subsequently moved by Benn to receive such evidence.⁸ This is so regardless of whether or not that evidence was properly excluded on the issue of damages (fair value of the Garfield and Sankin, Inc. stock) before the Special Master. For, once the Trial Court had formulated its resolution of the issues between Garfield and Benn-5410, the question of the value of the International Timber stock became critical. To assume its worthlessness and exclude proffered evidence to the contrary was error when viewed together with the relief granted Garfield, supra.

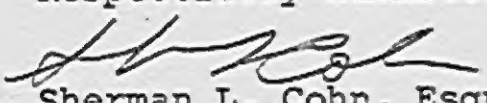
It is respectfully submitted that, regardless of the stock's worth, when the Trial Court effected restitution from Benn-5410 to Garfield as outlined above, it was bound by the most basic rules of

7. The oral opinion, Tr. 6052-63, was rendered on July 26, 1965

8. The Civil Docket of the District Court in C.A. 1493-59 and an examination by present counsel of particular items in the Clerk's file discloses that on Feb. 2, 1966, Benn moved to present evidence on the matter of valuation either to the Court or the Special Master; on Feb. 3, 1966, Benn filed a motion asking the Court to amend its previous order to the Special Master to the effect that the latter was to proceed on the assumption that the International Timber stock was worthless. Both of these motions were denied by the Court in its memo. opinion of Feb. 16, 1966, Docket pp. 29, 30. On July 17, 1967, Benn filed objections to the Special Master's report, Docket 33, and on the 31st of that month he moved to sustain his objections, id. 34; both were of no avail.

equity to similarly effect restitution from Garfield to Benn-5410 by declaring that Garfield had no equitable or legal interest in or right to possession of any shares of International Timber. Benn is prepared to prove, as he has been, that (1) the Surinam timber rights -- and hence the International Timber stock -- were then and are now of great value⁹ and that (2) Garfield has been continually enjoying the benefits of this windfall. If Benn can sustain his burden of proof on these facts -- as he honestly believes he can, largely through irrebuttable documentary evidence -- the manifest injustice of the Trial Court's inattention to this "loose end" becomes clear. To unjustly enrich Garfield in this way, would be totally inconsistent with the clear intention of the Trial Court to see to it that no wrongdoer -- which the Court emphatically found Garfield to be -- would profit from his wrongdoing. Since he was not permitted to do so during the course of the proceedings below, it is incumbent upon this Court to remand this case to the Trial Court with instructions that its Order be amended to include a declaration of Benn's right, title and interest in the 2,000 shares of International Timber Company and/or to take evidence in this matter and modify its judgment accordingly.¹⁰

Respectfully submitted,


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April 1969

9. Counsel has been informed that the timber rights in total are producing a net profit in excess of \$25,000 per month, the International Timber stock representing a 50% interest in said profit. See testimony of Joe W. Harris in United States v. Brown (fn. cont'd)

CERTIFICATE OF SERVICE

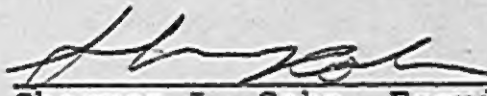
I hereby certify that on this 18th day of February 1969, I mailed, postage prepaid, a copy of the foregoing Petition for Rehearing to counsel for all other parties, as follows:

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(fn. 9 continued)

and Kent, D.D.C., Crim. No. 785-64; Tr. p. 1256, excerpts from which are attached to Benn's Motion To Present New Evidence filed in the instant case, Feb. 2, 1966.

10. It is further submitted that, in light of the foregoing, the Trial Court abused its discretion under F.R. Civ. P. 59(a)(2), in failing to grant Benn's motion for new trial on the issues here presented. Motion filed Jan. 29, 1968, App. 82; Motion denied by notation on original of motion, Docket, p. 40. Conceding, arguendo, that Benn's allegations as to the value of the timber rights/stock are true, it is apparent that denying him of either the stock or his day in court on the issue, in light of the disposition of the other Garfield - Benn-5410 matters, is denying him of his property without due process of law. He has been denied both.